70-151

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1152.

THE UNITED STATES, APPELLANT,

vs.

EDWARD J. McDERMOTT.

FILED APRIL 10, 1890.

No. 1603.

EDWARD J. McDERMOTT, APPELLANT,

vs.

THE UNITED STATES.

FILED JANUARY 30, 1891.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

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1 Proceedings of the circuit court of the United States for the district of Kentucky at a regular term begun and held at the Federal Court Hall, in the city of Louisville, on Monday, October 7th, 1889.

Present, Honorable Howell E. Jackson, judge of the United States for the sixth circuit.

EDWARD JOHN MCDERMOTT, PLAINTIFF,
v.
THE UNITED STATES OF AMERICA, DEFENDANT.

Be it remembered that heretofore, to wit, on the 25th day of February, 1889, came the plaintiff, by George Du Relle and H. G. Phillips, his attorneys, and filed in the clerk's office of our said court his petition against the above-named defendant, which petition is in the words and figures as follows, to wit:

Circuit court of the United States, district of Kentucky.

EDWARD J. MCDERMOTT, PLAINTIFF,
v.
THE UNITED STATES OF AMERICA, DEFENDANT. } Petition.

Petition.

Edward John McDermott, the petitioner and plaintiff herein says, that on the 28th day of September, 1888, he was, by the circuit court of the United States for the district of Kentucky, duly appointed a commis-
2 sioner of said court, and duly qualified as such, and took the oath of office prescribed in such cases; that thereafter, but on the same day, this petitioner was also by said court duly appointed chief supervisor of elections for the district of Kentucky, and immediately qualified as such and took the oath required by. Plaintiff acted as chief supervisor and commissioner at the registration of voters in this city of Louisville October 2d, 1888, and October 31st, 1888, and at the election for Congressman and Presidential elections, November 6th, 1888.

Plaintiff says that from September 28th, 1888, until several weeks after November 6th, 1888, he fully and faithfully performed his duties as chief supervisor and commissioner; that said duties were difficult and onerous, and, excepting perhaps eight or ten days, said duties had to be performed daily, during the time stated; that for two months after September 28th, 1888, plaintiff, in order properly and with dispatch, to discharge the duties of his said offices, needed and employed at his own expense, a legal assistant; that during said time plaintiff received various instructions and orders from the United States attorney for the district of Kentucky, and from the Attorney-General of the U. S., relative to the duties of his office, and he obeyed the said orders and instructions, as it was his duty to do.

Plaintiff says that he is a resident of Louisville, Ky.; that on his recommendation supervisors of election were appointed by said court in Louisville, Ky., for the registration October 2d, 1888, and for the election November 6th, 1888; and supervisors were appointed by said court on

plaintiff's recommendation for said election in Jefferson County, and in Paducah, Covington, and Newport, Ky., on October 2d, 1888, and on October 31st, 1888, were registered in Louisville, Ky., by proper officers
3 of the State of Kentucky, all voters who were not already registered and who were then entitled to be registered as voters qualified to vote for Representatives in Congress November 6th, 1888, at which time was held an election for Representatives in the Congress of the United States.

The chief days for the registration of the voters of said city were the 2d, 3d, & 5th days of July, 1888. Plaintiff caused the lists of voters made on said several registration days to be carefully scrutinized by the supervisors of election and caused reports to be filed before him by said supervisors showing all doubtful or fraudulent voters, etc. The investigation of said lists and voters greatly increased plaintiff's labors and expenses.

In discharging these various duties, plaintiff performed the services hereinafter stated and charged the fees provided therefor by sections 2031, 847, and 828, Revised Statutes of the United States, and plaintiff presented his account therefor to the said United States circuit court for the district of Kentucky, and said accounts were duly and properly allowed and approved by said court, and said accounts were thereafter presented to the auditor and the First Comptroller of the Treasury of the United States and by him were disallowed as to the services hereinafter mentioned and payment was refused to plaintiff for said services.

Par. I. As required by section 2026 Revised Statutes of the United States plaintiff "prepared and furnished necessary instructions for the use and direction of the supervisors of election," in the city of Louisville, Ky., at the registration of voters in said city October 2d, 1888, and explained to said supervisors their rights and powers and duties under the law with reference to said registration.

Said instructions were prepared after a careful examination of the Statutes of the United States and of the State of Kentucky, and the
4 decisions of their courts on the subject of elections, and said instructions were given to said supervisors orally and on paper. Said printed instructions contained 10 folios each, and they were delivered to 215 supervisors, and for drafting said paper the statute allows 15 cents per folio; and the proper charge for said instructions is $322.50. A copy of said instructions is filed herewith and made part hereof, marked registration instructions.

Prior to said election, November 6th, 1888, plaintiff also prepared and delivered orally and in writing to each of the 219 supervisors who served in the city of Louisville at said election full instructions relative to their rights, powers and duties at said election and relative to all legal questions that might arise in the course of said election. Each one of said instructions contained 13 folios, for drafting which the statute allows 15c. per folio, and hence the proper charge for said instructions was and is $427.05. A copy of said instructions is filed herewith and made part hereof, marked Election Instructions, Louisville.

Prior to said election plaintiff also prepared and delivered to each one of the 98 supervisors who served in Paducah, Covington, and Newport, and Jefferson County, Ky., instructions necessary and suitable for said county and said towns. Each one of said instructions contained eleven

folios, and hence the proper charge therefor was and is $161.70. A copy of said instructions is filed herewith and made part hereof, marked Election Instructions, Covington, etc."

Plaintiff prepared and sent by mail in proper time to each one of 210 supervisors appointed for the registration in Louisville, October 2d, 1888, a written notice of his appointment and of the time when and place where he could take the oath of office, and be instructed in his duties, etc., and each of said notices contained one folio, and hence the proper charge therefor was and is $31.50.

Plaintiff prepared and sent by mail in proper time to each one of the 319 supervisors who were appointed for the said election, November 6th, 1888, in Louisville, Jefferson County, Covington, and Newport, similar written notices of the time when and place where they would be qualified and instructed and provided with their books, etc., and each of said notices contained one folio, and the proper charge therefor was and is $47.85. The plaintiff paid the defendant postage on said notices and now plaintiff has been refused any allowance therefor. Said supervisors could be notified of their appointment better by mail than by any other means.

On November 19th, 1888, plaintiff received a letter from Mr. A. J. Gross, United States marshal of Kentucky, relative to the supervisors and special deputy marshals and said Gross inclosed a letter to himself from the Hon. A. N. Garland, Attorney-General of the United States, relative to certain official papers which he required the marshal to obtain before paying said supervisors and special deputy marshals for their services at said election, etc. Certified copies of said two letters are filed herewith and made part hereof marked, respectively, Gross Letter No. 1, and Garland Letter No. 1.

For a better understanding of the meaning and purport of the instructions of the Attorney-General, plaintiff wrote to the Attorney-General, November 19th, 1888, a letter of inquiry, and a copy of said letter is filed herewith and made part hereof, marked McDermott Letter No. 1.

On the same day the said United States marshal had written plaintiff another letter relative to the same subject and a certified copy of it is filed herewith and made part hereof, marked Gross Letter No. 2, and on
6 November 23d, 1888, plaintiff received a reply from the Attorney-General, a certified copy of which is filed herewith and made part hereof, marked Garland Letter No. 2. Desiring further guidance and instruction, plaintiff wrote a letter of inquiry to the Hon. J. C. Wickliffe, United States attorney for the district of Kentucky, November 30th, 1888, and received on the same day a reply thereto. A certified copy of said letter and the indorsement on the back thereof is filed herewith and made part hereof, marked McDermott and Wickliffe Letter.

From said correspondence it appears that plaintiff was instructed and requested by the Department of Justice or its officers to make for the use of the United States certified copies of the oaths of office of the said deputy marshals and supervisors filed with him and plaintiff in his letter of November 19th, 1888, notified the Attorney-General that he would charge the Government for such copies of the oaths of office of the supervisors, and the Attorney-General thereupon instructed him to make said copies. Plaintiff made 317 of said copies of the oaths of office of the supervisors, and 136 copies of the oaths of office of the special deputy

marshals, and each copy contained one folio, and to each copy plaintiff added his certificate, showing that it was a true copy.

The proper and legal charge for said 453 copies (15c.) and certificates (15c.) was and is $135.90, under sections 2031 & 828, R. Statutes of the United States. Plaintiff also attached his seal to said certificates as he was requested to do by the United States attorney for the district of Kentucky.

From said correspondence it also appears that plaintiff was requested and instructed by the officers of the Department of Justice of the United States to attach to the affidavit made by each supervisor and special deputy marshal, to show the number of days of his service, a certificate of plaintiff's own showing how many days such persons did in fact serve.

7 Plaintiff attached such a certificate to each affidavit made by 317 supervisors and 136 special deputy marshals and the proper and legal charge under section 828 of the Revised Statutes of the United States was and is $67.95, or 15 cents each. Plaintiff also attached his seal to said certificates.

At the registration of voters in Louisville, October 2d, 1888, a large number of persons qualified as voters were by the mistake of election officers refused registration, and as said voters were nevertheless entitled to vote for Representatives in Congress (sec. 2007, Revised Statutes U. S.) plaintiff heard all such voters and their witnesses under oath, and when satisfied of the right of said voters to vote for said Representatives in Congress plaintiff drafted and he issued under seal to the supervisors of election special instructions directing said supervisors not to challenge said voters, etc. Said instructions were attached to an affidavit of the voters receiving them. Twenty-three (23) of said instructions were issued and each contained 3 folios under seal, and the proper and lawful charge for said instructions and seal was and is $14.75.

Plaintiff also on the day of election drafted and issued under seal 22 other special instructions to said supervisors relative to the right to vote of persons who were qualified voters and whose right to vote had been unjustly denied because of the mistakes of officers of election.

Each of said instructions contained one folio. The proper and legal charge for drafting said instructions under seal was and is $7.70. Said instructions had to be issued under seal to avoid the danger of fraud on the day of election, &c. Said above-mentioned 45 instructions were returned to me by the supervisors and were filed by me to detect any fraud that might be committed and to preserve the proofs in case of any contest over the election. The proper and legal charge for filing said papers was

8 and is $4.50.

The plaintiff a few days prior to said election, November 6th, 1888, was compelled to attend the opening of said United States court in the town of Covington, to nominate and recommend persons suitable for supervisors of election in Covington and Newport, Ky., and plaintiff did go to Covington by the Ohio and Mississippi Railroad Company, and the shortest route to said town is 110 miles, and plaintiff is entitled to eleven dollars mileage for said travel. (§ 828 R. S.)

2. Par. Plaintiff was by law compelled to attend said United States court for the district of Kentucky (Revised Statutes U. S., § 2012, 2013, and § 2026) from the opening of said court, September 28th, 1888, until

the day following said election on November 6th, 1888, and to make nominations of supervisors and to suggest changes in any places deemed necessary. Many changes were made from time to time by said court, and almost every day plaintiff was recommending appointments or removals of supervisors.

Said court was actually open for business on Sept. 28 and 29, October 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 16, 17, 18, 19, 20, 23, 26, 29, 30, 31, and November 1 & 6th, 1888; that is, on 25 days, and on at least 25 days plaintiff was in fact making nominations and suggesting removals, etc. For plaintiff's dual services as chief supervisor and commissioner he is entitled (under § 847 Revised Statutes U. S.) for such "service, the same compensation as is allowed to clerks for like service," and under § 828, the clerk of said court is entitled to "five dollars a day for his attendance on the court while actually in session." For plaintiff's said attendance he is entitled to the sum of $125.00, payment of which has been refused by the defendant.

Plaintiff says that by § 2026 of the Revised Statutes of the United States, he was required to furnish "all necessary forms and blanks
9 for the use and directions of the supervisors," and he did draft the oaths of office of 369 supervisors, and each of said oaths contained one folio, and the proper and reasonable charge therefor was and is 15 cents per folio, or $55.35 in all; that plaintiff administered the said oath of office to 369 of said supervisors, and the proper and legal charge therefor was and is 10 cents each, or $36.90 in all; that plaintiff attached his certificate to each of said oaths, and the proper and legal charge therefor was and is 15 cents for each certificate or jurat, and the whole fee therefor was and is $55.35.

A few days prior to said election, November 6th, 1888, and on said day, plaintiff, in order to secure 23 qualified voters, lawfully refused registration, the right to vote given them by section 2007 Revised Statutes of the United States, as heretofore shown, had to issue special instructions to the supervisors relative to said voters, and plaintiff, to prevent fraud, had to swear said 23 voters relative to their right to vote and had to transmit said affidavits to the supervisors in order that said supervisors might detect any fraud attempted or any false swearing done to secure the right to vote as aforesaid. The proper and legal charge for administering said oath to said voters was and is 10 cents in each case, or $2.30 altogether, and the proper and legal charge for the jurat or certificate to said affidavit was and is 15 cents each, or $3.45 altogether.

Plaintiff says that in accordance with the letters and requests of the Attorney-General of the United States and the marshal of said United States circuit court for the district of Kentucky, and in obedience to the instructions of the United States attorney for the district of Kentucky, plaintiff drafted (pursuant to sec. 2026 R. S.) affidavits showing the number of days that each of 250 or more supervisors served, and each of said affida-
10 vits contained one folio, and the proper and legal charge therefor was and is 15 cents per folio, or in all $37.50; and plaintiff administered the oath to each of said 250 or more supervisors, and the proper and legal charge therefor is 10 cents each, or $25.00 for all; and plaintiff attached his certificate or jurat to each of said affidavits, and the proper

and legal charge therefor was and is 15 cents each, or $37.50 for all; said affidavits were required by the Department of Justice of the United States for the protection of defendant.

Plaintiff says that he drafted the affidavits or complaints on which he issued *a* warrants of arrest for the defendants, James Mosby, P. Mariso, et al., and that said affidavits or complaints contained 22 folios, and that the proper and legal charge therefor was and is 15 cents per folio, and hence $3.30 was and is the legal charge therefor.

Plaintiff says that he charged 15 cents for entering each return on the warrants or subpœnas in said cases, and that the whole amount so charged was $3.00, which was and is a reasonable charge.

Plaintiff says that in the case of United States v. P. Marso (who was not found) he charged a docket fee of $1.00, which was and is a legal charge; that in ten other cases tried by plaintiff as commissioner he charged a fee of $3.00 in each case, or $30.00 in all, for making dockets and indexes, etc., and that the proper and legal charge therefor was and is said sum charged defendant.

All of the foregoing fees and charges were duly approved and allowed by the circuit court of the district of Kentucky, and were duly presented to the proper officers of the Treasury Department of the United States, and all of them were disallowed by said officers and payment was refused to plaintiff by said officers of each and all of said fees and charges.

11. All of said sums of money aggregating the sum of $1,648.05 are now due to plaintiff by defendant for the services mentioned above, and defendant has refused payment to plaintiff of all and each of said sums of money.

Wherefore plaintiff prays judgment against the defendant for the sum of $1,648.05, with interest thereon, and for his costs herein.

GEORGE DU RELLE,
H. G. PHILLIPS,
Attorneys for Plaintiff.

Edward John McDermott says the statements of the foregoing petition are true as he verily believes.

EDWARD JOHN MCDERMOTT.

Subscribed and sworn to by Edward John McDermott before me this 25th day of February, 1889.

SAML. B. CRAIL,
U. S. Com'r.

Which petition is endorsed on the back as follows, to wit:

I certify that I have served a true copy of this petition and of the exhibits filed therewith upon J. C. Wickliffe, district attorney of the United States within and for the district of Kentucky, on this the 25th of February, 1889.

A. J. GROSS,
U. S. M., Ky. Dist.
By J. E. STONE,
D. M.

Sworn to before me by J. E. Stone this 25th day of February, 1889.

SAML. B. CRAIL,
U. S. Com'r.

The registration instructions referred to in the petition are as follows, to wit:

REG. IN'S'NS.

Instructions to supervisors.

DEAR SIRS: You are required to attend at the precinct for which
12 you are appointed on Tuesday, October 2d, 1888, and to attend the registration of voters there; you must remain at the place of registration from 6 a. m. to 9 p. m., and until the officers of registration have properly made and signed the certificates required by law.

You must see that the registration is made fairly, rightly, and without any force or fraud; you must detect and make a note of any violation of the law and report the matter to me fully hereafter. Read carefully the registration act, chapter 1033, vol. 2, acts 1883 and 1884, page 434. The act is in the registration books.

Qualifications of a voter.

Every male citizen who has resided in the State two years, and in the county, town, or city one year, and in the precinct in which he offers to vote sixty days next preceding the election, shall be a qualified voter and is entitled to register October 2d, if he did not register in July last.

If any person not a qualified voter offer to register challenge him, and have him sworn and examine him strictly as to his residence and other qualifications as a voter. If he was registered in July object to his registering again. If the judges allow any man challenged and sworn to register, you must have the clerk write opposite his name the words "challenged and sworn;" you must personally and constantly inspect and scrutinize such registry of voters and write your names under the last name on each page of the registration list. At the close of the registration you must count each vote registered and make out and return next day to the chief spervisor, in the blank book furnished you, a certificate showing the number of voters registered, any errors made by the officers, and all violations of law by the officers or other citizens and showing the number of voters who were challenged and sworn, and who were nevertheless registered by officers, and the names and addresses of the challenged voters, and
13 the names and addresses of the witnessess to identify them and to prove their guiit and the time of day when the thing was done.

You must also show the names of any persons improperly registered, because they were registered in July, and any changes made in the July lists. He must see that no man's name appears twice on the registration books, whether he is registered in July or not.

Report to me the names of all persons that you believe are registered twice, and all frauds you detect unlawfully. Any man that registers or unlawfully tries to register twice, or to aid or abet such fraud, and any disqualified person that tries to register, and any person that tries to injure or destroy the registration, and any officer that, with unlawful intent, adds or subtracts names improperly, and any person that tries to interfere with the registration or the voters desiring to register violates the law, and proof must be secured against him, and he will suffer a heavy fine and imprisonment.

The registration act should be interpreted as follows:

1st. Qualified voters who registered at the last July registration are entitled to vote at the November election without further registration.

2nd. Voters properly registered in July last, and who have not since changed their residences can not lawfully register again at the October registration Tuesday next, but as there may be mistakes in copying the lists it is recommended that the voters inquire at their new precincts, on the registration day, to see that their names have been properly copied on the new books, and if they have not been so copied the mistake should be corrected by reference to the original registration books.

3d. A subdivided list or copy should be properly and accurately made and certified by the county clerk to the registration officers of each new precinct of those whom the registration books of July last show them to have resided within the boundaries of such new precinct. The said rearranged and certified lists or copies so prepared by the county clerk will be *prima facie* evidence of the right of a voter therein named to vote at the ensuing election. If, in the copying, any registered voter's name is omitted, it can be corrected by reference to the original registration books.

Interference with supervisors.

You must see that there are no fraudulent or disorderly practices around the registration place. Any person who threatens, assaults, or interferes with a supervisor in the discharge of his duties, or refuses to assist him on demand in the discharge of his duties, is liable to instant arrest and fine and imprisonment. In bad cases of interference, &c., you may arrest the offender immediately, and in all cases you must report the facts under oath to the chief supervisor within ten days.

Unfaithful supervisors.

Any supervisor who fails to discharge his duties after taking the oath of office shall be subject to removal from office with loss of pay, and shall be punished by heavy fine and imprisonment.

The duties of your office are important; you must see that 'our lists of voters are absolutely correct and that no frauds are perpetrated now by persons who wish to nullify the votes of good men at the coming election. Carefully abstain from electioneering, discussion, and controversy at the registration places, and give your whole time and attention to the discharge of your duties.

Be careful not to give offense to anybody needlessly, but perform your duties with impartiality, with candor, and with fearlessness. You must be vigilant, but not captious or boisterous. Anything like partisanship or negligence will be cause for immediate removal. Our country's greatest danger is in a corrupted ballot, and against that evil you must guard all of our citizens without regard to the triumph of any political party.

Respectfully,

EDWARD J. MCDERMOTT,
Chief Supervisor.

LOUISVILLE, KY., *October* 1, 1888.

The election instructions (Louisville) referred to in the petition are as follows, to wit:

ELECTION INSTRUCTIONS.

Instructions to United States supervisiors of elections.

LOUISVILLE, KY., *October* 23d, 1888.

To the supervisors of elections:

On Tuesday, November 6th, 1888, you must be at the election precinct for which you are appointed at 6 a. m., and must remain there from that time until every vote has been cast and counted in the evening, and until the certificates required by law of the officers of election are written and signed after the close of the poll.

The polls must be kept open until 7 p. m.

You must challenge and have sworn and question any person who, in your judgment, has not a right to vote. You must scrutinize, respectfully but carefully, the manner in which votes are received and see how they are recorded and how the ballots are deposited, etc., and you must detect, if possible, any bribery, intimidation, fraud, or other offenses committed at your precinct. You must take such a place at or near the poll-books or ballot box or registration books as will best enable you to perform your duties, but do not interfere with the other officers of election any more than may be absolutely necessary. They have certain duties to
16 perform and should not be hindered when they are doing what the law requires of them. You can not prevent the judges from receiving votes, but if they receive improper votes you must report the facts to me. The law provides suitable punishment for any offenses that may be committed by them. Do not allow electioneerers or idle spectators to crowd around the polls so as to hinder voters in the exercise of their rights.

At the close of the polls you must count each ballot cast and make out and return to me in the blank book furnished you a certificate, showing the number of votes cast for each person, for whom a vote has been cast for Representative in Congress, and you should state in what respect, if at all, your certificate differs from that of the State officers of the election. You must also examine the certificate of said officers and should attach to it any statement you may deem proper to make relative to the truth and accuracy of their statement or relative to the fairness of the election or the count of the vote.

In your blank book you must also note and report the names of all voters challenged by you and whether such votes were received or rejected, and their number on the poll book and the hour of the day when this happened, and the names of the witnesses that can support your statement. Fully record in your book any detected violations of law by voters, electioneerers, or officers. In ordinary cases you need only report the offender to me after the election. In cases requiring prompt action, report to me immediately, and if absolutely necessary arrest the offender. In the absence of a U. S. marshal you are also a peace officer and are charged with the duty of preserving order at the polls and of preventing fraudulent voting or fraudulent conduct on the part of any officer of election.

You may also in such cases arrest without warrant any person who commits any offense against the United States in your presence, and
17 any person so arrested you must immediately bring before me or some other commissioner of the United States for examination.

Violations of law.

The principal offenses that you must detect are:

(1) Voting more than once.

(2) Voting at the wrong precinct.

(3) Voting without the right to do so; that is, voting by persons not qualified or not rightly registered.

(4) Bribery.

(5) Interference with the officers of election, or with the supervisors in the discharge of their duties.

(6) Knowingly receiving improper votes or refusing to receive proper votes by the officers of election.

(7) Unlawfully hindering or preventing any citizen from voting. Intimidation, etc., at the polls.

Qualifications of a voter.

Every male citizen of the age of twenty-one years, who has resided in the State two years, or in the county, town, or city in which he offers to vote one year next preceding the election, shall be a voter, but such voter shall have been for sixty days next preceding the election a resident of the precinct in which he offers to vote. (Const. Ky., art 2, §8.)

Every voter (1) must have these qualifications and (2) he must have been properly registered. A few men who were qualified voters and offered to register on Tuesday, October 2, 1888, were refused registration by election officers by mistake. I shall provide such persons on proper affidavits with a certificate stating that, in my opinion, they are entitled to vote. If you are presented with such a certificate signed by me do not challenge the voter, if you sure that he is the proper person. If you know that he swore falsely in his affidavit, and that he is not a qualified voter *at*
18 that he did not present himself at his precinct for registration on October 2, 1888, arrest him and report to me at once. If any other person not on the registration book offer to vote they must be challenged, of course. If since a voter was registered he has moved out of the precinct in which he was registered he may not vote. If he has been improperly registered challenge him and have him sworn and questioned, and report the facts to me.

A voter shall not lose his residence by absence for temporary purposes merely; nor shall he obtain a residence by being in a county or precinct for such temporary purposes, without the intention of making the county or precinct his home. He loses his residence by removal to and residence in another State with intention to reside there an indefinite time or by voting there, even though he may have had the intention to return here at some future period. The place where the family of a man resides shall generally be considered his residence unless the family so resides for a temporary purpose. If his family is permanently in one place, and he transacts his business in another, the former shall be his residence.

If you suspect that one person is trying to vote under the name of another, have the suspect sworn and questioned. If any person tries to vote because he was registered at the September municipal registration in Louisville, November 1st, 1888, you must challenge him and object to his vote. If he be received, arrest him and report to me the names of the officers who received his vote. Persons registered on that day are not qualified voters at this election. Any person who "votes without having a lawful right to vote," and any officer who "knowingly receives the vote of any person not entitled to vote or refuses to receive the vote of any person entitled to vote, or aids, counsels, procures, or advises any such voter, person, or officer to do any act hereby made a crime or omit to do any duty the omission of
19 which is hereby made a crime, or attempts to do so, shall be punished by a fine of not more than $500.00, or by imprisonment not more than three years, or by both, and shall pay the cost of prosecution."

Any person who threatens, assaults, or obstructs a supervisor in the discharge of his duties or refuses to assist him when required to do so by such supervisor, is liable to instant arrest and fine and imprisonment. In bad cases, arrest the offender; in ordinary cases, simply report the facts to me promptly after the election.

Any supervisor who fails, after taking the oath of office, to perform his duties shall be subject to removal from office with loss of pay and to punishment by imprisonment of not less than six months nor more than one year, or by a fine of not less than $200.00 or more than $500.00, or by both fine and imprisonment. You must not electioneer or indulge in discussion or controversy, and you must give your whole time to your work as supervisor. Be vigilant, but not captious or boisterous. You must be impartial and just to all persons. No partisanship on your part must be shown, but a fearless and honest effort to make the election perfectly fair and pure will be expected of you under all circumstances. We have an unpleasant—perhaps thankless—duty to perform as officers under oath, but under every discouragement and embarrassment we must fearlessly enforce the law as we understand it.

EDWARD J. McDERMOTT,
Chief Supervisor of Elections for Kentucky.

The election instructions, Covington, &c., referred to in the petition, are as follows, to wit:

20 ELECTION INST'NS., COVINGTON, &C.

Instructions to United States supervisors of elections.

LOUISVILLE, KY., *October 23d*, 1888.

To the supervisors of elections:

On Tuesday, November 6th, 1888, you must be at the election precinct for which you are appointed at 6 a. m., and must remain there from that time until every vote has been cast and counted in the evening, and until the certificates required by law of the officers of election are written and signed after the close of the poll. The polls must be kept open until 7 p. m.

You must challenge and have sworn and question any person who, in your judgment, has not a right to vote. You must scrutinize respectfully but carefully the manner in which votes are received, and see how they are recorded and how the ballots are deposited, etc., and you must detect, if possible, any bribery, intimidation, fraud, or other offenses committed at your precinct.

You must take such a place at or near the poll books or ballot box or registration book as will best enable you to perform your duties, but do not interfere with the other officers of election any more than may be absolutely necessary. They have certain duties to perform, and should not be hindered when they are doing what the law requires of them. You can not prevent the judges from receiving votes, but if they receive improper votes, you must report the facts to me. The law provides suitable punishment for any offense that may be committed by them. Do not allow electioneerers or idle spectators to crowd around the polls so as to hinder voters in the exercise of their rights.

At the close of the polls you must count each ballot cast, and make out and return to me, in the blank book furnished you, a certificate showing the number of votes cast for each person for whom a vote has been cast for Representative in Congress, and you should state in what respect, if at all, your certificate differs from that of the State officers of the election. You must also examine the certificate of said officers, and should attach to it any statement you may deem proper to make relative to the truth and accuracy of their statement, or relative to the fairness of the election or the count of the votes.

21

In your blank book you must also note and report the names all voters challenged by you, and whether such votes were received or rejected, and their number on the poll book, and the hour of the day when this happened, and the names of the witnesses that can support your statement. Fully record in your book any detected violations of law by voters, electioneerers, or officers. In ordinary cases you need only report the offender to me after the election. In cases requiring prompt action report to me immediately, and if absolutely necessary arrest the offender. In the absence of a U. S. marshal you are also a peace officer, and are charged with the duty of preserving order at the polls, and of preventing fraudulent voting or fraudulent conduct on the part of any officer of election. You may also in such case arrest without warrant any person who commits any offense against the United States in your presence, and any person so arrested you must immediately bring before me or some other commissioner of the United States for examination.

Violations of law.

The principal offenses which you must detect are:

(1) Voting more than once.

(2) Voting at the wrong precinct.

(3) Voting without the right to do so—that is, voting by persons not qualified.

(4) Bribery.

(5) Interference with the officers of election or with the supervisors in the discharge of their duties.

(6) Knowingly receiving improper votes or refusing to receive
22 proper votes by the officers of election.

(7) Unlawfully hindering or preventing any citizen from voting—intimidation, etc.—at the polls.

Qualifications of a voter.

"Every male citizen of the age of twenty-one years, who has resided in the State two years, or in the county, town, or city in which he offers to vote one year next preceding the election, shall be a voter, but such voter shall have been for sixty days next preceding the election a resident of the precinct in which he offers to vote." (Const. Ky., Art. 2, § 8.)

A voter shall not lose his residence by absence for temporary purposes merely; nor shall he obtain a residence by being in a county or precinct for such temporary purposes without the intention of making the county or precinct his home. He loses his residence by removal to and residence in another State with intention to reside there an indefinite time, or by voting there, even though he may have had the intention to return here at some future period. The place where the family of a man resides shall generally be considered his residence, unless the family so reside for a temporary purpose. If his family is permanently in one place and he transacts his business in another, the former shall be his residence.

If you suspect that one person is trying to vote under the name of another, have the suspect sworn and questioned. Any person who "votes without having a lawful right to vote," and any officer who "knowingly receives the vote of any person not entitled to vote, or refuses to receive the vote of any person entitled to vote, or aids, counsels, procures or advises any such voter, person, or officer to do any act hereby made a crime, or attempts,
to do so, shall be punished by a fine of not more than $500.00, or by
23 imprisonment not more than three years, or by both, and shall pay the cost of prosecution."

Any person who threatens, assaults, or obstructs a supervisor in the discharge of his duties, or who refuses to assist him when required to do so by such supervisor, is liable to instant arrest and fine and imprisonment. In bad cases arrest the offender; in ordinary cases simply report the facts to me promptly after the election.

Any supervisor who fails after taking the oath of office to perform his duties, shall be subject to removal from office with loss of pay and to punishment by imprisonment of not less than six months nor more than one year, or by fine of not less than $200.00 or more than $500.00, or by both fine and imprisonment. You must not electioneer or indulge in discussion or controversy, and you must give your whole time to your work as supervisor. Be vigilant, but not captious or boisterous. You must be impartial and just to all persons. No partisanship on your part must be shown, but a fearless and honest effort to make the election perfectly fair and pure will be expected of you under all circumstances. We have an unpleasant, perhaps thankless, duty to perform as officers under oath, but under every discouragement and embarrassment, we must fearlessly enforce the law as we understand it.

EDWARD J. MCDERMOTT,
Chief Supervisor of Elections for Kentucky.

Gross letter No. 1, etc., referred to in the petition, are as follows, to wit:

24 GROSS LETTER NO. 1.

OFFICE OF UNITED STATES MARSHAL,
Louisville, Ky., Nov. 19th, 1888.

Hon. E. J. McDERMOTT,
Chief Supervisor Ky. District, Louisville, Ky.:

DEAR SIR: I herewith enclose you a copy of letter of Attorney-General relative to the appointment of supervisors and special U. S. deputy marshal.

Most respectfully,

A. J. GROSS,
U. S. M., Ky.

GARLAND LETTER NO. 1.

H. H. L. M. B.
File # 6188, 1886.

DEPARTMENT OF JUSTICE,
Washington, D. C., November 13th, 1888.

A. J. GROSS,
United States Marshal, Louisville, Ky.:

SIR: In answer to your letter of the 6th instant you are informed that commissioner's affidavits and badges of special deputy marshals and of supervisors of elections should be affixed to the pay rolls as vouchers when forwarded to the Treasury for settlement.

Very respectfully,

A. H. GARLAND,
Attorney-General.

GROSS LETTER #2.

OFFICE OF UNITED STATES MARSHAL,
Louisville, Ky., Nov. 20th, 1888.

Hon. E. J. McDERMOTT,
Chief Supervisor of Elections for Ky.:

DEAR SIR: I received instructions from the Hon. A. H. Gar-
25 land, Attorney-General of the U. S., informing me that before paying any supervisors of elections for services I must have his commission and his affidavit showing that he performed such services, and that the same facts should also be known to me through other means. As you alone know what services your deputies performed, I beg you to attach to each affidavit of the supervisors your official certificate as to the justness or unjustness of the claim.

Respectfully,

A. J. GROSS,
U. S. Marshal, Ky. District.

McDERMOTT LETTER NO. 1.

NOVEMBER 19TH, 1888.

Hon. A. H. GARLAND,
Attorney-General, Washington, D. C.,

DEAR SIR: In your instructions to the U. S. marshal relative to the payment of supervisors must present their "commissions, oath, and badge of office with an affidavit that they are the persons to whom the commission issued, that they performed the days' service as charged," &c. "The same facts should also be known to you through other means."

The supervisor's oath of office, I am, by the statute, required to file with my papers and preserve; but if you wish, and so order, I will give each supervisor a certified copy of the oath of office and will charge the Government for the copy.

That will make a complete record of his right to the pay. I shall also attach to each affidavit made to prove the number of days' service a certificate of my own showing for how many days each supervisor is entitled to pay. I alone know that I alone can officially certify it, and you seem to desire such a certificate according to the language of your instructions.

26 Yours truly,

EDWARD J. McDERMOTT,
Chief Supervisor of Elections for Kentucky.

GARLAND LETTER NO. 2.

H. H. File 1836–1884. L. M. B.

DEPARTMENT OF JUSTICE,
Washington, D. C.

E. J. McDERMOTT, Esq.,
Chief Supervisor of Elections,
Louisville, Kentucky.

SIR: In answer to your letter of 18th instant, you are requested to give each supervisor a certified copy of his oath of office that the record of his right to payment may be made complete.

Very respectfully,

A. H. GARLAND,
Attorney-General.

WICKLIFFE AND McDERMOTT, LETTER NO. 1.

LOUISVILLE, KY., *November 20th*, 1888.

Hon. J. C. WICKLIFFE,
U. S. Attorney, Dist. of Ky.:

DEAR SIR: In the Attorney-General's instructions to the marshal, he directs the marshal to require before payment of fees to deputy marshals and supervisors "that each deputy and supervisor will present his commission, oath, and badge of office, with an affidavit that he is the proper person to whom the commission issued; that he performed the days' sevices as charged, &c., &c. The same facts should also be shown to you through other means." You said some weeks ago that it was your opinion that I should attach to each of such supervisor's affidavits my official certificate under seal, stating that the claim was just.

27 Since then the Attorney-General has written me to make an official copy of each supervisor's oath of office filed with me and to give official copy to U. S. marshal. (1) Should I now give him also an official copy of each deputy marshal's oath of office filed, and (2) should I attach my certificate, under seal, of the justness of each claim made by said deputy marshals to the affidavit made by them when they presented their claims?

Yours truly,

EDWARD J. MCDERMOTT,

On the back of the foregoing letter, the following was written by Hon. J. C. Wickliffe, U. S. Attorney.

WICKLIFFE-MCDERMOTT LETTER NO. 1.

NOVEMBER 30TH, 1888.

Mr. MCDERMOTT,

Chief Supervisor of Elections Dist. of Ky.:

SIR: In answer to the enclosed, I would say that I think you are required to furnish an official copy of the oath of office of each of the deputy marshals and supervisors attested by your seal of office, and also that your certificate upon their affidavits of their services should also be attested by your seal of office.

J. C. WICKLIFFE,
U. S. Attorney.

The foregoing are true copies of the originals in my office.

E. J. MCDERMOTT,
Chief Supervisor Elect., Ky.

Demurrer.

And on the 3d day of April, 1888, came the defendant and filed its demurrer to the petition of plaintiff herein, which is as follows:

Circuit court of the U. S., district of Ky.

EDWARD J. MCDERMOTT
v.
UNITED STATES.

The defendant demurs to the petition herein, and says that the facts
28 stated do not constitute a cause of action against the defendant.

J. C. WICKLIFFE,
Att'y for U. S.

The plaintiff's affidavit is as follows, to wit:

Affit. of plaintiff.

Circuit court of the United States for the district of Kentucky.

EDWARD JOHN MCDERMOTT
v.
UNITED STATES.

Affiant, Edward John McDermott, says that he has caused a copy of the petition and exhibits filed herein to be served on the Hon. J. C. Wickliffe, United States attorney for the district of Kentucky, and that affiant

mailed to the Hon. A. H. Garland, Attorney-General of the United States, a copy of said petition and exhibits by registered letter, and affiant attaches hereto and makes part hereof a receipt of Virginia C. Thompson, postmistress of the United States at Louisville, Kentucky. Said receipt is marked "Exhibit receipt."

EDWARD JOHN MCDERMOTT.

Subscribed and sworn to by Edward John McDermott before me this 25th day of February, 1889.

SAML. B. CRAIL,
U. S. Comr.

The "Exhibit receipt" referred to is as follows:

Ex. rec'pt.

Registered {Letter / parcel} No. 2868. P. O., Louisville, Ky.

Received Feb. 25th, 1889, of Edw. John McDermott, 425 W. Jeff. str., a {Letter / parcel} addressed to Hon. A. H. Garland, Washington, D. C.

VIRGINIA C. THOMPSON, *P. M.*
Per T.

The affidavit of Ford is as follows:

Ford's affi.

Circuit court of the U. S., district of Kentucky.

EDWARD JOHN MCDERMOTT
v.
UNITED STATES.

29 Affiant, James T. Ford, says that he is a resident of Louisville, Ky., and a practicing attorney in the courts of said State; that from September 28th, 1888, to this date, he has been in the office of plaintiff and has witnessed the performance by plaintiff of the duties and services set out in the petition; that affiant has read the petition, and that the facts stated therein are true; that plaintiff performed the services, and according to the statutes for such cases made and provided, earned the compensation set out in said petition.

JAMES T. FORD.

Subscribed and sworn to by James T. Ford before me this 28th day of March, 1889.

SAM'L B. CRAIL, *U. S. Comr.*

And on another day of said term of said court, to wit, on the 25th day of June, 1889, came the parties, by their attorneys, and filed their written agreement herein. Came also the defendant and filed two exhibits.

The written agreement above referred to is as follows:

Agreement.

Circuit court of the United States, district of Kentucky.

McDERMOTT
v.
UNITED STATES.

It is agreed between the parties hereto that the affidavit of James T. Ford on file herein shall on the hearing of this case be read as the deposition of said Ford.

J. C. WICKLIFFE, *U. S. Attorney.*
E. J. McDERMOTT, *Plff.*

The exhibits referred to are as follows:

(1.)

Circuit court of the United States for the district of Kentucky.

FRIDAY, *September 28th*, 1888.

30 Exhibit 1.

Edward J. McDermott is appointed a commissioner of the circuit court of the United States for the district of Kentucky to take acknowledgments of bail and affidavits, the depositions of witnesses in civil cases, and to exercise all the other powers vested in such commissioners by the several acts of Congress.

Whereupon he took the oath required by law.

A true copy.

Attest: SAM'L B. CRAIL,
Clerk.

The exhibit (2) referred to above is as follows:

Exhibit 2.

Circuit court of the United States for the district of Kentucky.

Friday, September 28th, 1888.

It is ordered Edward J. McDermott be and he is hereby appointed chief supervisor of elections for the district of Kentucky to exercise and discharge all the duties required of such officer under Title XXVI of the Revised Statutes of the United States.

A true copy.

Attest: SAM'L B. CRAIL,
Clerk.

31 *Judgment.*

And at a term of our court held for its October term, 1889, to wit, on Monday, October 21st, 1889, the court this day filed a written opinion in this cause setting forth the specific findings by the court of the facts therein, and the conclusions of the court upon all questions of law involved in the case.

It is therefore considered by the court that the plaintiff, Edward J. McDermott, recover of the defendant, the United States, the sum of $1,500.65 dollars, with interest thereon at the rate of four per centum per annum, from this date until the time when an appropriation is made for the payment of this judgment, and his costs herein expended.

32 The written opinion above referred to is as follows:

Circuit court, Ky., district.

EDWARD J. McDERMOTT
v.
THE UNITED STATES.

This suit is brought by the plaintiff to recover fees claimed by him for services rendered as circuit court commissioner and chief supervisor of elections. The provisions prescribed by the acts of Congress approved March 3d, 1887, giving this court jurisdiction in such cases, seem to have been strictly complied with in the bringing of the suit, viz, an account exceeding $1,000 in amount, succinctly stated in plaintiff's petition, with the nature of the claim duly set forth, and the proof that a copy of the petition has been served upon the district attorney, and another copy mailed by registered letter to the Attorney-General.

The district attorney has appeared, filed a general demurrer to the petition, together with his statement to the court that he "can file no objections" to the items claimed by the plaintiff. Record evidence is on file in the case, showing petitioner's appointment as commissioner and chief supervisor, and it is shown that the items claimed were embraced in plaintiff's account against the United States, which was duly approved by the court in the usual way, and as prescribed by the act of Congress, approved Feb. 22d, 1875 (suppl't to R. S. P. P. 145, 146), and forwarded to the Treasury Department at Washington, where they were audited and the items here claimed were disallowed to plaintiff by the First Comptroller.

The plaintiff has given his deposition showing that he actually performed the services, the fees for which are sued for here, and to the same
33 effect is the affidavit of James T. Ford, who was in plaintiff's law office in Louisville, during the rendering of these services, and which affidavit is by agreement, to be treated as a deposition. The petition itself is duly sworn to and the case is submitted to the court upon the written arguments of plaintiff's counsel.

The record in this proceeding abundantly shows that the services sued for were actually rendered in good faith and with an honest endeavor to faithfully perform the duties required by law of the plaintiff in his character of commissioner and chief supervisor; and this is admitted by the

Government, in terms by the district attorney, and by the demurrer, which raises for the decision of the court the question whether the fees charged for such services are authorized by law.

For convenience, the fees claimed by the plaintiff for work done by him as commissioner will be considered separately from those claimed for services rendered as chief supervisor of elections.

I.

Section 828 of the Revised Statutes contains the tariff of fees chargeable by clerks of the Federal courts and is as originally enacted Feb. 26, 1853, having remained unchanged since then, while section 847, R. S., also a part of the same act of Congress, prescribes the fees payable to commissioners for certain services "and for any other service, the same compensation as is allowed to clerks for like services."

(a) "The supervisors of elections appointed and commissioned by the court, by virtue of section 2012, R. S., upon the recommendation of the chief supervisor (R. S., 2026), are sworn officers whose oaths the chief supervisor must "preserve and file" as required by the latter section.

Plaintiff charges for drawing these oaths of office 15 cents per
34 folio, administering the *the* oath to each supervisor 10 cents, and for his jurat or official certficate in writing that each oath was administered 15 cents in each instance, these fees aggregating the sum of $147.60. Commissioners are allowed "for administering an oath ten cents," R. S., 847; and clerks of the Federal courts "for entering any return, etc., or drawing any bond, or making any record, certificate, return, or report, for each folio fifteen cents." Oaths of office "may be taken before any officer who is authorized either by the laws of the United States, or by the local municipal law, to adminester oaths in the State, Territory, or district where such oath may be administered," R. S., sec. 1758: Vide also sec. 1778, R. S.

These oaths were, therefore, required by law to be taken and filed, and they thereupon became a part of the records in the office of the chief supervisor. The sections of the statutes above quoted and referred to prescribe the rate of fees for taking them as claimed by the plaintiff, and no good reason appears why the defendant should not pay the same. Exactly similar items were allowed in re Conrad, 15 Fed. Rep., 641, and in Gayer v. United States, 33 Fed. Rep., 625. It will be noticed that the charge is for drafting the official oath, swearing the officer to the same, and attaching the plaintiff's certificate or jurat thereto. The fee of ten cents is given by the statute for "administering" the corporal oath, as in case of a witness to testify and the additional fee of 15 cents for the jurat is allowable where the person taking the oath subscribes to the paper as a deposition, affidavit, and the like, and the officer annexes his jurat as the record evidence appearing on the instrument itself that such oath was administered.

(b) The next claims in the plaintiff's petition to be considered are precisely similar to the foregoing, viz: Drafting affidavits of the supervisors,

showing by the several oaths that they had actually performed the
35 services for which compensation was claimed by them, respectively, administering an oath to each with the officer's jurat or certificate of the same. They amount to the sum of $100. Supervisors of election

are paid by the marshal and receipt to him on pay rolls furnished by the Government for that purpose. Here the Attorney-General, by a communication the marshal before the supervisors were paid, advised him that "affidavits of supervisors of election should be affixed to the pay rolls as vouchers when forwarded to the Treasury for settlement." This instruction of the Attorney-General was by letter furnished to the plaintiff and the work was, for this reason and upon such request and instruction, done by the plaintiff as charged for. There can be no reason why the Government should not pay the fees.

(c) In certain criminal cases heard before the plaintiff as commissioner for violations of the election laws by the various defendants therein, he claims fees at 15 cents per folio for drawing the complaints or affidavits on which the warrants were issued, amounting to $3.30, and for entering the returns of the warrants and subpœnas for witnesses in the Government in the cases, at 15 cents each, in the sum of $3.00, or in all $6.30. It would be difficult to conjecture any legal reason for the disallowance of these small fees at the Treasury Department. Section 1014 of the Revised Statutes provided the mode of criminal procedure, "at the expense of the United States," where offenders are arrested "for any crime or offense against the United States," and *and* taken before "commissioners" or other proper officers for preliminary trial and examination. Such arrests can be made only by virtue of a warrant issued upon a complaint under oath. The fee of 15 cents a folio, as shown above, is prescribed by sections 828 and 847, R. S. The fee "for entering any returns" is also fixed by statute "for each folio fifteen cents." R. S., 828.

36 In the register of the Department of Justice, "compiled by the authority of the Attorney-General," and issued by the Attorneys-General successively for now nearly twenty years is a "form of commissioners' account of fees in cases where preliminary examinations are had, among other instructions to those officers from the Department of Justice; and this form has been continued without change through all the publications. Among the items are those for "drawing complaints" and "entering returns" of "warrant" and "subpœna" at the same rate per folio as is charged by the plaintiff here. Those fees have also been allowed in the following cases: Barber v. U. S., 35 Fed. Rep., 886, and Rand v. U. S., 36 Fed. Rep., 671, and the charges being correct the plaintiff should be allowed them here.

(d) The plaintiff claims docket fees in the cases heard before him preliminarily as commissioner, to wit, $1.00 in the single case dismissed and $3.00 each in the cases in which there were actual hearings, in all $31.00. Section 828, R. S., gives clerks "for making dockets and indexes, taxing cost and all other services (than those otherwise enumerated in the section) on the trial or argument of a cause where issue is joined and testimony given, three dollars," and "in a cause which is dismissed or discontinued, one dollar." In United States v. Wallace, 116 U. S., 398, the Supreme Court, affirming the judgment of the Court of Claims in the case, held that commissioners were entitled to the same fees as clerks for making dockets and indexes, etc., Justice Matthews delivering the opinion. And the judgment of the court is based on section 847, R. S., giving commissioners the same compensation as clerks per like services.

The decision was made in 1835, and in that case the commis-
37 sioner was required by an order of the court to keep a docket containing certain entries, as is the case with commissioners at Louisville. Later, in 1887, following the case of U. S. vs. Wallace, supra, Judge Butler, of Pennsylvania, in Phillips vs. U. S., 33 Fed. Rep., 164, held that an order of court was not necessary, that "the duty of keeping a docket seems to be a plain implication from the authority conferred to issue process and hear cases," and that "a commissioner could not properly discharge his functions without keeping a record of his proceedings."

And to the same effect is Knox vs. U. S., 23 Ct. of Claims, 374. The right of commissioners to be paid docket fees, as they are popularly called, seems thus to have been finally settled in their favor, and no doubt or question could now be properly entertained concerning it, were it not for a proviso contained in the deficiency appropriation bill passed Aug. 4, 1886, chap. 903, 24 Stats., 256. It is as follows: "Be it enacted, etc., that the following sums be, and the same are hereby, appropriated, out of any money in the Treasury not otherwise appropriated, to supply deficiencies in the appropriations for the fiscal year 1886, and for other objects hereinafter stated, namely: * * Judicial * * . Fees of commissioners: For fees of commissioners and justices of the peace acting as commissioners, fifty thousand dollars; provided, that for issuing any warrant or writ and for any other necessary service, commissioners may be paid the same compensation as is allowed to clerks for like services, but they shall not be entitled to any docket fees."

Several of the courts have considered this statute. The first case decided was by Judge Bruce, of the middle district of Alabama, in November, 1887, being Bell vs. U. S., 35 Fed. Rep., 889, in which the plaintiff, a commissioner, was held to be entitled to these docket fees notwithstanding the provisions of the statute above quoted, and judgment was rendered in the district court in his favor.

38 From this decision an appeal was taken to the circuit court by the United States, and the appeal was dismissed upon argument in July, 1888. The next case in point of time is Strong vs. U. S., 34 Fed. Rep., 17, decided in the district court for the southern district of Alabama, in Feb'y, 1888, by Judge Toulmin, pending the appeal of the former case, in the circuit court, and the right of commissioners to docket fees is denied under the proviso in the act of Aug. 4th, 1886, above quoted. In Rand vs. U. S., 36 Fed. Rep., 671, decided by Judge Webb in the district of Maine in October, 1888, this statute is fully examined and construed and the decision reached that the proviso does not take away the right of commissioners to receive docket fees, but only excepts their payment out of the sums appropriated by the act of Congress containing the proviso. And to the same effect are Rand vs. U. S., 38 Fed. Rep., 665, decided by the same court as the case last cited, and Hoyne vs. U. S., 38 Fed. Rep., 543, in which a similar judgment was rendered by Judge Blodgett at Chicago, both the cases last cited having been determined in April, 1889. These are the only decisions reported on this question.

The act of Aug. 4th, 1886, does not refer to sections 828 and 847, R. S., nor in terms repeal them, nor does it contain the usual provision that all acts and parts of acts not consistent with it are repealed. If section 847 is not repealed as to commissioners' docket fees, the plaintiff here is of

course entitled to recover them. If repealed it can only be by implication, and courts look with small favor to the construction of a statute which would necessarily repeal another, unless the intention of the legislative body is manifest and the language clear. The title of this act is, "An act making appropriations to supply deficiencies in the appropriations for the fiscal year 1886 and for prior years, and for other purposes," while the enacting clause recited an appropriation of money for the deficiencies of that year "and for other objects."

This act, embracing some 53 pages of the statute book, contains but four other provisos besides the one pertaining to commissioners' fees, viz, one providing that no part of the sum appropriated to pay certain judgments shall be available till the right of appeal has expired; another, appropriating certain moneys for a reservoir, provides that a board of engineers shall make a full report of the work, etc.; another, appr'iating certain moneys for postmasters' salaries, with a proviso that they shall be adjusted in the method pointed out; and still another, where a sum was appropriated for the expense of a board of visitors to the Naval Academy, with a proviso "that no part of this sum or of any other appropriation by Congress for expenses of the board of visitors shall be used to pay for intoxicating liquors;" and this is the only provision containing new general legislation in the entire act, and its terms are clear and plain that the provision is intended to have a wider scope than the expenditure of the money appropriated by this portion of the bill.

As a matter of fact, though it is not proven in this record, the Comptroller disallowing these fees has allowed them to commissioners in this circuit without question since the passage of the act of August, 1886, thus construing the proviso as operating only to prevent the use of the money thereby appropriated to the payment of such docket fees earned during the fiscal year of 1886 and prior years.

The act in question was simply a deficiency appropriation bill; its function was only to appropriate money to pay sums already due from the Government; it contains no single provision other than an appropriation of public money for this purpose; and that this proviso was intended to repeal a general law on the subject of fees of over 30 years standing, without any reference to it and without any clause repealing it in terms, and without any general repealing clause, will not be imputed to Congress, and the court ought not to so presume. These fees should, therefore, be allowed to the plaintiff.

II.

The fees of chief supervisors of election are prescribed by section 2030 of the Revised Statutes, which provides that they shall be allowed and paid for services as such certain compensation apart from and in excess of all fees allowed by law for the performance of any duty as circuit court commissioner. Their duties are mainly prescribed by sections 2020 and 2026 Revised Statutes.

The plaintiff here, as chief supervisor, prepared and furnished instructions to the supervisors concerning their duties at the registration of voters at Louisville, for which he claims $322.50 and like instructions for their guidance at the election in that city for member of Congress, his charge

for which is $427.05, together with instructions for the election supervisors in other towns (of less than 20,000 inhabitants) where there was no registration, claiming therefor $161.70; in all $911.25.

The statute requires the chief supervisor to prepare and furnish the supervisors with all necessary "instructions" for their "direction" in the discharge of their duties, and an examination of the various provisions of the law on this subject will show that their functions are different in the large cities of over 20,000 population from what they are in smaller cities and in the country, hence these different sets of instructions, for which plaintiff claims compensation at 15 cents per folio, some being ten,
41 others 11, and the rest 13 folios in length. There are two reported cases as to these fees for instructions by chief supervisors: In re Conrad, 15 Fed. Rep., 641, and Gayer v. U. S., 33 Fed. Rep., 625, the former decided in 1883 and the latter in 1888. In the Conrad case, the chief supervisor was held entitled to be paid for such instructions 15 cents per folio, while in the Gayer case he seems to have been allowed that fee for preparing the instructions and a fee of 10 cents a folio for the copies of them sent to the supervisors.

Since this case was submitted to the court the plaintiff has furnished an additional brief, showing recent rulings by the accounting officers of the Treasury, made with the approval of the Attorney-General, under which such instructions are paid for at the rate claimed here, and there has been filed the original report from the First Comptroller's Office, dated June 8, 1889, allowing to the chief supervisor in Indiana, on a rehearing of the disallowances in his account, the fees for similar instructions at 15 cents a folio, and other supervisors in this judicial circuit have since been paid similar fees, as I am informed.

These instructions seem to have been issued to the supervisors generally, but the proof shows that upon notice they appeared before the chief supervisor in person, and were orally instructed as to their duties, in addition to each receiving one of the printed instructions, and it is not conceived that under such circumstances the officer's fees would be different from what they would where original instructions were issued to each supervisor, and addressed to him over the signature of the chief supervisor, though the latter is certainly the safer and better course.

And, while of course the construction given by the accounting
42 officers to a statute is not binding upon the courts, it would seem to be a hardship to adjudicate the question against the petitioner where there is really no contest between the parties over it, and where it is conceded that the amount charged is correct; it is accordingly allowed.

b. As to the special instructions issued respectively to 23 supervisors at one time and to 22 at another, concerning particular subjects and particular names of voters, on the one hand appearing on the registration lists, and on the other hand denied registration, there can be no doubt that each was an original and should be paid for at 15 cents per folio, the fees for which amount respectively to $14.75 and $7.70, and the same are allowed, together with the fee of 10 cents for filing returns of same, $4.50.

c. The petitioner charges 15 cents each for notices sent by him as chief supervisor to the various supervisors by mail, the fees amounting in all to $79.35. The court appointed these supervisors upon information furnished to it by the chief supervisor, sec. 2026, R. S., and it was his duty to receive, preserve, and file their oaths as such, to properly instruct them

as to their duties, and to receive from them "all certificates, returns, reports, and records of every kind and nature," under the provisions of the act authorizing their appointment. The statute does not provide how these officers shall be notified of their appointment, nor in terms whose duty it is to so notify them, but the chief supervisor is in a sense their immediate superior and such notification by him is eminently proper, and there should be some provisions made to pay for the service, but the courts can not make a statute or supply its omissions by strained constructions.

43 It seems that no statute has taken notice of such items of official service by the chief supervisors and provided a fee for them.

d. In the correspondence between the Attorney-General and the chief supervisor and marshal at Louisville (a copy of which is filed in this record) concerning the payment by the latter of the election supervisors and deputy marshals, the petitioner was required to furnish the marshal with copy of all their oaths of office, for which he claims here $135.90. The oaths were on file in his office and he was their proper custodian (R. S., section 2026). For a copy of any paper on file the statute allows him 15 cents a folio (R. S., section 2031). It was his duty to make and furnish these copies, and the statute fee therefor is certainly chargeable to the Government. The petitioner has computed the copies at 15 cents a folio for the copy and 15 cents for his certificate thereto, which makes this claim $135.90 for the copies and $67.95 for the certificates thereto, for which he is entitled to judgment.

e. In addition to these copies of their oaths the chief supervisor was required to furnish his own official certificate to be attached by the marshal to each deputy marshal's and supervisor's account, showing the number of days each performed service as such officer. The instructions contained in the correspondence above referred to, as well as the correspondence between the petitioner and the district attorney, show this beyond any question, and the fee of 15 cents for each such certificate is charged in accordance with the statute and amounts to $67.95 in all.

f. Petitioner was obliged to attend the United States court at Covington in the performance of his official duties as chief supervisor, and he charges mileage at 10 cents a mile one way for 110 miles. The

44 statute gives neither commissioners nor chief supervisors mileage in any case whatever, nor can the court.

It was doubtless the petitioner's duty to attend the court, as he did, and as it will not be presumed that the law requires duties and expenses from an officer without compensation, perhaps petitioner's *expenses* on this trip to Covington might be recoverable were they sued for, but the claim for mileage must be disallowed.

g. Section 2026, Revised Statutes, prescribes, among other duties of the chief supervisor, that he shall cause the names of those who may register and vote, or either, "whose right to register or vote is honestly doubted, to be verified by proper inquiry and examination," etc., and in pursuance of this authority petitioner administered an oath to each of 23 voters who were refused the right to register, and he charges 10 cents each for same, and 15 cents for the certificate or jurat to such oath. As these are the fees prescribed by law, plaintiff should be allowed this compensation for his services in this behalf in the sum of $5.75, as claimed.

h. The remaining item of $125 is for a per diem fee of $5 a day for attendance on the circuit court of Kentucky 25 days in the discharge of his duties as chief supervisor. Section 2011, Revised Statutes, provides that "within not less than ten days prior to the registration" or election, if there be no registration, the court shall be open for the transaction of the business contemplated by the Statutes, Title XXVI, and "shall proceed to appoint and commission, from day to day and from time to time," the election supervisors. (R. S., sec. 2012.)

The chief supervisor is required to receive all applications for
45 the appointment of supervisors and "upon the opening of the circuit court for the judicial circuit in which the commissioners so designated (as chief supervisor) acts, he shall present such applications to the judge thereof, and furnish information to him in respect to the appointment by the court of such supervisors of election" (section 2026, R. S.), and "there shall be allowed and paid to each supervisor of election who is appointed and performs his duty under the preceding provisions compensation at the rate of five dollars per day for each day he is actually on duty, not exceeding ten days." (Sec. 2031, R. S.)

The case in Re Conrad, 15 Fed. Rep., 641, holds that the chief supervisor under this legislation is entitled to the per-diem fee, but limits the amount to ten days' attendance. In Gayer vs. U. S., 33 Fed. Rep., 625, the chief supervisor was allowed this per-diem fee for 26 days, the court placing his recovery on the ground that "he would be entitled as commissioner when engaged in his official duties for services analagous to these," to be so paid. In the Conrad case the court construes the words "supervisor of election" to embrace the chief supervisor, in the Gayer case he is held not to be embraced within them, the two cases thus proceeding to judgment on widely different grounds.

There is no similarity whatever between the duties to be performed by the supervisor and the chief supervisor and by the statute (R. S., Sec. 2030) the former is paid only by a per-diem fee while the latter is paid according to the tariff of fees prescribed in that section. There is no per-diem fee whatever provided by section 847, R. S., for attendance upon the circuit or dis-
46 trict court, but only for time employed in the preliminary examination of defendants charged with criminal offenses, which certainly bears no analogy to the duties required of the chief supervisor by Title XXVI of the statutes.

Nor can his services performed simply as chief supervisor be paid for by the fees provided for commissioners for entirely different duties, although the same person holds both offices. There being, therefore, no provision in the law authorizing the payment of per-diem fees to a chief supervisor of elections, petitioner can not be allowed them, and judgment must be refused as to this item.

It follows from the foregoing conclusions that the plaintiff is entitled to recover of the United States the amount of the several sums herein allowed him as proper charges for the services rendered by him both as United States commissioner and as general supervisor of elections, and judgment is accordingly awarded him against the defendant for the aggregate amount of said allowances.

HOWELL E. JACKSON,
Circuit Judge.

Appeal.

And at a term of our court held for its February term, 1890, to wit, on Tuesday, March 11th, 1890, came the plaintiff and prayed an appeal to the Supreme Court of the United States, which is granted.

DISTRICT OF KENTUCKY, *ss:*

I, Samuel B. Crail, clerk of the circuit court of the United States for the district of Kentucky, at Louisville, do hereby certify that the foregoing forty-six pages, this included, contain a true and complete
47 transcript of the record of the proceedings had in the court in the case mentioned in the caption hereof.

Witness my hand and the seal of said court this 27th day of March, 1890.

[SEAL.] SAM'L B. CRAIL,
Clerk.

Circuit court of the United States, district of Kentucky.

MONDAY, *October* 20th, 1890.

EDWARD J. McDERMOTT
vs.
THE UNITED STATES.

This day came the plaintiff and prayed a cross appeal to the Supreme Court of the United States which is granted.

I, Sam'l B. Crail, clerk of the circuit court of the United States for the district of Kentucky, at Louisville, do hereby certify that the foregoing is a part of the record in the above styled cause which is now pending in the Supreme Court of the United States.

Witness my hand and seal of said court this 24th day of November, 1890.

[SEAL.] SAM'L B. CRAIL,
Clerk.

In the Supreme Court of the United States, October Term, 1890.

UNITED STATES, APPELLANT,
vs.
EDWARD J. McDERMOTT, APPELLEE. } No. 1152.

It is stipulated and agreed that the foregoing order granting cross appeal may be filed and printed as a part of the record in this cause.

WM. H. TAFT,
Solicitor-General.
ORRIN B. HALLAM,
Attorney for Appellee.

(Indorsed on cover:) No. 1152, The United States, appellant, *vs.* Edward J. McDermott. Filed April 10, 1890. No. 1603. Edward J. McDermott, appellant *vs.* The United States. Filed January 30, 1891. Kentucky C. C. U. S.

Office Supreme Court U. S.
FILED,
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JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

THE UNITED STATES, APPELLANT,
vs.
EDWARD J. McDERMOTT, APPELLEE. } No. 1152.

ERROR OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

EDWARD J. McDERMOTT, APPELLANT,
vs.
THE UNITED STATES, APPELLEE. } No. 1603.

CROSS-ERRORS TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

APPELLANT'S ASSIGNMENT OF ERROR AND BRIEF ON APPEAL IN NO. 1152.

JOHN B. COTTON,
Assistant Attorney-General.
JOHN C. CHANEY,
Assistant Attorney.

In the Supreme Court of the United States.

OCTOBER TERM, 1891.

THE UNITED STATES, APPELLANT.
vs.
THOMAS J. McDERMOTT, APPELEE. } No. 1152.

ASSIGNMENTS OF ERROR.

The United States, appellant, assigns as error of the circuit court of the United States for the district of Kentucky against appellee herein the following, and says:

COMMISSIONER'S FEES.

1. That the said court erred in its conclusions of law upon the facts found in and concerning appellee's alleged fees as United States circuit court commissioner for the district of Kentucky, the items of which, and the errors in which, are particularly assigned, as follows, to wit:

(*a*) The supervisors should bear the expense of their being sworn into office—the same is not a proper charge against appellant, and the court erred in finding the same a legal charge against the Government.

(*b*) The oath taken by the supervisors of having faithfully performed their duties is not a necessary one, is not a legal charge against appellant, and the court erred in holding said charge legal.

(*c*) "Drawing complaints" is not provided for in the duties of commissioners, and the court erred in finding that the appellee might legally charge a fee therefor.

(*d*) "Docket fees" were abolished by the act of August 4, 1886 (24 Statutes at Large, 274), and the court erred in finding that appellee might legally charge a fee for keeping a docket.

CHIEF SUPERVISOR'S FEES.

2. And appellant urges that the said court erred in its conclusions of law upon the facts found in and concerning appellee's charges as chief supervisor for the district of Kentucky, particularly assigned as follows:

(*a*) There is no provision of law for the payment of fees for the instruction of supervisors of elections and the court erred in finding that the charge herein was a legal one against the Government.

(*b*) That the court erred in allowing appellee's charge for issuing the special instructions herein, for the reason the same are not authorized of law.

(*c*) That the court erred in holding the charge herein legal for the issuing of notices of appointment by the chief supervisor to the supervisors of election, for the reason that the same is not authorized of law.

(*d*) That the court erred in holding the charge legal herein for the furnishing of copies of oaths of the super-

visors of elections to the Department of Justice, for the reason that there is no provision of law authorizing the furnishing of such copies to said Department.

(*e*) That the court erred in awarding judgment in favor of appellee for the charge herein of fees for the chief supervisor's official certificate to the "copies of the oaths of the supervisors," assigned in the next preceding error, for the reason that said "copies" being unauthorized and illegal, said "certificates" are and were unauthorized and illegal.

(*g*) That the court erred in allowing the charge herein for administering an oath to each of 23 voters who were denied the "right to register," for the reason that the chief supervisor is not authorized by law to administer an oath.

For these reasons appellant urges a reversal of the action thereon of the lower court.

JOHN B. COTTON,
Assistant Attorney-General.
JOHN C. CHANEY,
Assistant Attorney.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

THE UNITED STATES, APPELLANT,
vs.
EDWARD JOHN MCDERMOTT, APPELLEE. } No. 1152.

APPELLANT'S BRIEF.

This is an appeal from the circuit court of the United States for the district of Kentucky.

It is stipulated and agreed that "a cross appeal may be filed and printed as a part of the record of this cause," and there is accordingly indorsed thereon, under No. 1603, the appeal of Edward J. McDermott, appellant, *vs.* The United States. Filed January 30, 1891 (Kentucky, C. C. U. S.).

The questions involved in this case are appellee's alleged fees as chief supervisor of elections of the State of Kentucky, and also his fees as commissioner of the United States circuit court for the district of Kentucky.

In order to preserve order and arrangement in the consideration of the questions involved we shall follow the fashion of the judge of the lower court, and consider:

1. Appellee's charges for drawing the oaths for the supervisors, 15 cents per folio, and for administering each oath to the supervisors, 10 cents, and for his jurat to each oath, 15 cents, aggregating $147.60.

This entire service is due from the supervisors themselves, and not from the Government. It is simply the service of "swearing in" the supervisors.

When civilians become Government officers they shall subscribe an oath to faithfully discharge their duties, etc.

It is their own act, for which they are personally responsible, and to whom the person administering the oath must look for remuneration, and when he is paid as commissioner for the oath he can not have the fee for his seal as supervisor. (*Muirhead* vs. *U. S.*, 13 C. Cls. R., 251.)

As supervisor he is not authorized to administer an oath, and as commissioner he can not administer oaths in other than matters within his sphere of action. United States *vs.* Reily, 131 U. S. 58; also section 1778, R. S. U. S.

2. Swearing the supervisors that they actually performed their duties, $100.

He will, probably, be entitled to no fee for this service. This is not a duty incumbent upon the chief supervisor nor commissioner.

He might make up a certified report of the services rendered by the supervisors, attach his seal thereto, especially if such action is preliminary to paying these officers,

and get paid at the rate allowed by law; but we do not see that the service charged for meets such a requirement.

However, see *Conrad* vs. *United States* (15 Fed. R., 641), and *Gagur* vs. *United States* (33 Fed. R., 625).

3. "Drawing complaints, etc., as commissioner" is not allowed under the fee bill, and the opinion of the Court of Claims in the *Stafford Case* (25 C. Cls. R., 280) is against the allowance of such a fee. See also Strong *vs.* U. S., 34 Fed. R. 17; also McKnistry *vs.* U. S., Id. 211. (But see case of Ravieses, 24 C. Cls. 224.)

For entering the returns of warrants, etc.

This may be properly classed as the "filing and caring for," etc., and may be allowed.

The cases of *Barber* vs. *United States* (35th Fed. R., 886) and *Rand* vs. *United States* (36 Feb. R., 671) are referred to in the opinion of the court below.

DOCKET FEES.

4. The decisions of the lower courts are referred to by the court which tried this case in the first instance, and after an analysis of the reasons adduced for allowing such fees on the one hand, and disallowing them on the other, said court allows the docket fees herein charged.

As to the allowance of such fees, all depends upon the construction which may be given to the statute of August 4, 1886 (24 Statutes at Large, 256–274).

There is no doubt that commissioners, being simply committing officers, and their courts not being courts of record, docket fees, originally, were not thought of. (See Register, Department of Justice, 1886.) At most their dockets could be nothing more than mere memoranda. The circuit

court is in full control of the commissioners, can take from the commissioners at any time the conduct of a case, and with the case goes the papers. It was, however, later considered that dockets might be kept and charged for, especially if ordered by the court (notably the case of Wallace, 116 U. S., 398), and in 33 Fed. R., 164, even if kept by the commissioner's own volition.

Since the passage of the "act" referred to, the courts are divided. The Court of Claims, at 23 C. Cls. R., 374, and several Federal courts holding to the notion that, in the light of that "act," no docket fee can now be charged, and *contra* several Federal courts, some holding *that* legislation to be general, others that it is special.

The question, therefore, comes to us, Did that act intend to, and does it, apply simply to the $50,000 appropriated by it, or does it strike down all such fees henceforth?

What is general legislation and what is special legislation, and how can we tell the one from the other?

By general legislation it is certainly meant that which applies to the realm throughout in relation to any particular thing which has been and is the subject of legislation.

By special legislation must be meant that legislation which applies to a special matter, person, or thing singled out from any general class of matters, persons, or things.

To determine what is intended by a law must be obtained from the law itself, if determination can be gleaned from the language of the law itself.

It is always presumed that the legislature means what the natural language of the act imports.

Incidental rules of interpretation are of use and are to be brought into use only when the meaning is clouded.

If, therefore, the language used be unambiguous and plain, susceptible of easy understanding, the duty of the interpreting power is easy and the language of the act is literally followed; the common understanding of the words and sentences used is to be the guide to the meaning and intention of the legislature.

The language of the act of 1886, found at page 274 of 24 Statutes at Large, is as follows:

> That for issuing any warrant or writ and for any other necessary service commissioners may be paid the same compensation as is allowed to clerks for a like service, *but they shall not be entitled to any docket fees.*

This does not limit or restrict the abolition of docket fees.

There is no misunderstanding of this language if we set it out by itself and give the words used their ordinary meaning and the sentences therein the benefit of their ordinary grammatical construction.

It is, however, coupled with an act appropriating money.

It is submitted that because of this it would not be improper to do what it is contended was done here.

The act has a title which would call attention to such legislation.

That this legislation means to abolish charges for keeping a docket for the future seems to be the common meaning of the act. It first appropriates $50,000, and then says:

> (*Be it enacted by the Senate and House of Representatives in Congress assembled*), That for issuing any

warrant or writ, or for any other necessary service, commissioners may be paid the same compensation as is allowed to clerks for like services, but they shall not be entitled to docket fees.

Why was it thought necessary to refer to the fees of commissioners at all unless it was intended to *fix* the *fees?*

It was already the law, that for necessary services commissioners should have the same fees to which clerks were entitled for like services. Why speak of it again?

It is evident that the legislature intended by this "act" to *fix* the *fees.* The language does not restrict this "fixing of fees" to the payments from the $50,000, but it says commissioners (generally) shall (hereafter) have *certain fees,* and they shall *not* have *docket fees.*

If the legislature had intended any other meaning it would doubtless have used language something like this:

"For issuing writs, warrants, and other necessary service the commissioner shall have out of this appropriation the same fees as clerks are allowed for like services, but no part of the said $50,000 shall be paid out for docket fees."

It may be said that this act does elsewhere contain "general legislation."

Appropriation is made for the expenses of a Board of Visitors at the Naval Academy, followed by a proviso "that no part of this sum or of any other appropriation by Congress for expenses of the Board of Visitors shall be used to pay for intoxicating liquors." Henceforth, therefore, no drunkard shall inherit the right to tipple while enjoying the privileges and immunities of a mem-

ber of the Board of Visitors to the Naval Academy unless he does it at *his own* expense.

Objection is urged to this act repealing section 847 as to this matter.

In the first place it is not clear that docket fees are authorized by section 847, and there would be nothing to repeal unless said section authorizes such fees. But because an act is not specifically mentioned does not argue that it can not be repealed by a subsequent act. A repeal by implication is as effectual as any. Besides Congress, doubtless, did not see anything in said section 847 to warrant the necessity of mentioning it in connection with the abolition of docket fees. Docket fee charges had grown up by a sort of impression that perhaps dockets ought to be kept by commissioners, and if they ought to be kept, doubtless on the principle that the "laborer is worthy of his hire," the commissioner should be paid for this service.

A statute fixing a salary different from one prescribed by a former act by necessary implication repeals the former.

Endlich's Interpretation of Statutes (sections 206, 207, 209).
Pierpont vs. *Crouch* (10 Cal., 315).

The salary of a quartermaster was fixed at $4 per day, but the appropriation act allowed $200 per year. It was held that the salary should be $20 per year, at least so long as the appropriation lasted.

Section 215, *Endlich, supra.*
109 U. S., 504, *Townsend* vs. *Little.*

20 Iowa, 145, *Burke* vs. *Jeffries*.
22 Mich., 322, *Crane* vs. *Reeder*.
34 N. Y. L., 75, *State* vs. *Kelley*.

So that, because the act was a mere "appropriation bill," and that if it abolishes docket fees it does it by implication, does not seriously interfere with the theory that docket fees are by said act and since that time illegal and improper.

5. Appellee, as chief supervisor, prepared and furnished instructions to the supervisors concerning their duties at the registration of voters at Louisville, $322.50, and like instructions for their guidance on election day, $427.50; also instructions for towns of less than 20,000 population, $161.70. Total, $911.25.

The cases of Conrad, 15 Fed. R., 641, and Gayer, 33 Fed. R., 625, are referred to to sustain the finding of the court below.

In the case of Muirhead, 13 C. Cls., 257, and 15 C. Cls., Cls., 116, it is held that section 2031, which allows the chief supervisor 15 cents a folio for a copy "of any paper on file" in his office, do not extend to a pamphlet of instructions printed by him and sent to his subordinates. They must be regarded as original instructions printed for convenience. Filing one copy did not constitute the others copies of it.

In the absence of any statutory authority for this excessive charge, it is submitted that the same can not be allowed.

6. As to the special instructions issued to 23 supervisors at one time and 22 at another, $14.25 and $7.70, respectively, this would seem to fall within the objec-

tion next preceding. And, too, if these are not properly papers—files of his office—he would not have the right to charge for *filing* the same, $4.50.

It is allowed that he shall have a fee for filing any proper and necessary papers, but not for unnecessary incumbrances of his office.

7. The next item is that of notices to supervisors of their appointment, $79.35.

The court appointed the supervisors upon the recommendation of the chief supervisor and commissioned them.

What is better notice of a man's appointment to an office than his commission, and if his commission was sent him what other paper is necessary to advise him of his appointment to the office?

It was probably the duty of the clerk of the court, upon the commissioning of the supervisors as aforesaid, to send by mail to their respective addresses their commissions. If by this charge it is meant that the supervisors having been appointed by the court were notified to come in, take the oath, and get their commissions, the notification is equally without the line of the duty of the chief supervisor, and the notification in that event is only the effort of a moment, as stationery is furnished for the purpose. More than this, an office seeker is supposed to be omnipresent, and no notification is necessary, especially no paid notification is required. At all events, it is certain that the chief supervisor has nothing to do with their notification. *His* duty ends when he has recommended certain men for appointment; thenceforward the court arranges details as to the appointment, and, presumably, attends to their notification and to the sending of commissions.

In the absence of statutory authority for the charges in this item, it is submitted it can not be allowed.

8. The next item is for copies of oaths of supervisors furnished the Department of Justice upon the request of the Attorney-General, $135.90.

Section 2026 makes it the duty of the chief supervisor to receive, preserve, and file all oaths of office of supervisors of elections.

He was therefore the proper custodian of these oaths, and would be entitled to fees for copying the same, if *anybody* would be so entitled. The only question would be as to the necessity for the Attorney-General's requirement that copies should be furnished.

If copies are made, are they complete copies without a certificate (67.95) of that fact?

And can he, therefore, get a fee for making a *copy*, and also a fee for a *certificate* to this *copy?*

9. The next item is for certificates to the deputy marshals' and supervisors' accounts for services rendered, upon which statement those officers are paid $67.95.

This will fall within the category of the necessity for such service and the Attorney-General's right to require it. If such a proceeding is a necessary preliminary to their payment, it is proper, and if not, the charge can not be allowed.

10. The next item is for mileage to attend the court, upon which the lower court found for the Government, and very properly, it would seem, as there is no statutory provision made for such expenses.

11. The next item is for administering oaths to 23 men who were refused a right to register, $5.75.

The chief supervisor has no right to administer an oath; no statute for it, and Muirhead, 13 C. Cls. R., 251, confirms this statement.

12. The next and last item of charges is $125 per diems, 25 days in attendance upon the circuit court, at $5 per day; and the finding of the lower court is in favor of the Government, of which no complaint is made.

The court very properly says there is no similarity of the offices of the chief supervisor and that of the supervisor. The *supervisor* is paid a per diem for his services, but the chief supervisor is not. His compensation comes in a different way. He is paid by *fees*.

Section 2031 provides no per diem for the chief supervisor.

He can not charge as commissioner a per diem for his attendance upon court, for the commissioner is only allowed a per diem when sitting as a committing court presided over by himself.

The *Conrad Case* (15 Fed. R., 641) gets the *supervisors* mixed with *chief* supervisors, and therefore allows them the same compensation, $5 per day. A very casual scrutiny would have shown the court that these officers were widely different both in their duties and in the manner and amount of their compensation.

In re Gayer (33 Fed. R., 625). *Contra.*

The court gave the supervisor his per diems on the ground that he was entitled to them as commissioner, losing sight of the fact that even a commissioner is not entitled to per diems for attending anybody's court but

his own—and that while he is sitting as a committing court considering a criminal charge.

The reasoning of the lower court herein is worthy of adoption and is submitted as the correct view as to these per diems.

It is, therefore, respectfully submitted that the action of the lower court in its findings against the Government must be reversed and that otherwise it must be sustained.

JOHN B. COTTON,
Assistant Attorney-General.
JOHN C. CHANEY,
Assistant Attorney.

FEBRUARY 20, 1891.

Office Supreme Court U. S.
FILED
MAR 2 1891
JAMES H. MCKENNEY
CLERK

Supreme Court of the United States

October Term, 1890.

THE UNITED STATES, Appellant,
vs.
EDWARD J. McDERMOTT, Appellee. } No. 1,152.

AND

EDWARD J. McDERMOTT, Appellant,
vs.
THE UNITED STATES, Appellee. } No 1,603.

Appeals from the Circuit Court of the United States for the District of Kentucky.

BRIEF FOR EDWARD J. McDERMOTT.

ORRIN B. HALLAM, *Attorney.*

Supreme Court of the United States

October Term, 1890.

THE UNITED STATES, Appellant,
vs.
EDWARD J. McDERMOTT, Appellee. } No. 1,152.

AND

EDWARD J. McDERMOTT, Appellant,
vs.
THE UNITED STATES, Appellee. } No. 1,603.

Appeals from the Circuit Court of the United States for the District of Kentucky.

BRIEF FOR EDWARD J. McDERMOTT.

On behalf of Edward J. McDermott, appellee in the orginal and appellant in the cross appeal, it is respectfully submitted that the decree appealed from is erroneous to his prejudice in the following particulars.

SPECIFICATION OF ERRORS ON CROSS APPEAL.

1. In not allowing him as chief supervisor $79.35 or any part thereof, charged for notices to supervisors of their appointment.

2. In not allowing him as chief supervisor $11.00 or any part thereof charged for mileage attending the U. S. court at Covington.

3. In not allowing him as chief supervisor $125.00 or any part thereof charged as *per diem* for attendance in the circuit court 25 days.

Argument.

The claimant sued the United States for his services in two official capacities U. S. Commissioner and Chief Supervisor. In its opinion the court below separated these two classes of fees, and for convenience of argument the same order will be preserved in this brief, although all the fees, except such as are earned in the trial of criminal offences against the election laws, might be fairly treated as fees due to the plaintiff as chief supervisor rather than as commissioner. He does the work as chief supervisor but is paid according to the scale of fees designed more particularly for clerks and commissioners. Section 2031 says in effect that the chief supervisor shall be paid certain fees for certain services therein specified and for other services which he is required to render, he shall be paid such fees as are allowed commissioners; and, by the 847th section a commissioner is, for some services, allowed the same fees as are allowed clerks "for like services."

Fees as Commissioner.

The opinion of the circuit court divides the fees charged as Commissioner into four classes: (1) for drafting oaths and affidavits and for administering the oath and attaching the jurat thereto, etc.; (2) for drafting complaints on which warrants are based; (3) for entering returns on subpœnas; and (4) for making dockets and indexes.

1. The first item considered in the opinion of the court is a charge for drawing the oaths of office, etc. The 2026th section of the Revised Statutes of the United States requires the chief supervisor to prepare and fur-

nish all necessary books, forms and blanks for the use of the supervisors who have not the skill or knowledge sufficient to enable them to prepare such things for themselves. To make the supervisors pay for this service is to diminish their compensation; the government can not afford to be mean or miserly with its officers in this way; the oath is taken for the protection of the government; it alone is interested. The *per diem* allowed the supervisors must be presumed to be only fair compensation for the work actually done. To reduce the pay by compelling the supervisors to expend fees to qualify after appointment is neither just nor politic. Their allowance is small enough now and to put these annoying, little exactions on them is to give them needless burden without affording any commensurate advantage.

When the government requires an oath to be taken by its officers, it should provide somebody that will prepare, administer and certify the oath. The chief supervisor is the proper person to do this work. Under sections 847 and 828 Revised Statutes of U. S., he would be allowed, for drafting these papers, the same fee he is allowed for drafting all other papers, namely, 15 cents per folio; for administering the oath a fee of 10 cents is allowed; for adding the certificate or jurat the fee allowed is 15 cents. In the Conrad case 15 Federal Reporter 643 the court said: "These oaths of office were necessary. Each supervisor had to take the oath and it had to be signed by the affiant and the same is required to be filed in the office of the supervisor. A reasonable construction of said section leads to the conclusion that the chief supervisor is the proper person to furnish the blank oaths. The charge is 15 cents a folio and is clearly within the provisions of section 828 Revised Statutes."

See Gayer *vs.* U. S., 33 Fed. Rep. 627.

These oaths are required by law. But the appellee also rightly charged for the affidavits which, on the orders of the Attorney-General and the U. S. Marshal, be prepared in order to make the supervisor swear how many days they had served, etc. This work was done solely for the protection of the government on the orders of the Department of Justice. The government should not be allowed to repudiate the orders of its officers in authority. The chief supervisor was bound to obey. Under section 828 Revised Statutes of U. S. he is entitled to 15 cents per folio for drawing these papers, 10 cents for administering the oath and 10 cents for the jurat. It is not the government's policy to diminish an official's compensation by requiring him to pay fees for complying with conditions incident to his installment and the settlement of his stewardship. These conditions are for the government's own protection and the expenses of fulfilling them are incurred at its instance and are a proper charge on the public treasury. The Attorney-General had authority to order these papers for the protection of the government and the service should be paid for by the government.

In Walker *vs.* U. S., 41 Fed. Rep. 672, the court allowed these fees and approved the ruling of Judge Jackson in this case. To same effect 5 Lawrence Repts. 850.

2. For drawing complaints in criminal proceedings. If the forms of commissioners accounts sent out by the Attorney-General for twenty years as set out in the opinion of the court below (Record p. 21) do not constitute an estoppel, they are conclusive evidence of continuous construction. The fact that such fees are not chargeable is a recent discovery; only one court has recognized it as a valuable discovery. The Court of Claim in the, as yet, unreported case of Stafford *vs.* United States, decided in 1890, held that the service was not re-

quired by laws of the United States, nor was it alleged that it was required by the laws of the State for committing magistrates of that State." Amt. IV of the U. S. Constitution declares that "no warrants shall issue but upon probable cause supported by oath or affirmation." A similar provision is found in the constitution of Kentucky, and the criminal code of that commonwealth contains the following sections:

"Sec. 31. *When Magistrate shall issue a warrant.* A magistrate, shall issue a warrant for the arrest of a person charged with the commission of a public offense when from his personal knowledge or from information given to him on oath he shall be satisfied that there are reasonable grounds for believing the charge."

"Sec. 32. *May examine witnesses to ascertain offender.* A magistrate, if satisfied that a felony has been committed, shall have power to summon before him any persons he may think proper for examination on oath concerning it, to enable him to ascertain the offender and issue a warrant for his arrest."

It is to be presumed that the Kentucky legislature used the word "information" in its technical sense which in French law is defined as "the act or instrument which contains the *deposition* of witnesses against the accused." Pothrer Proc. Law, Sec. 2, Article V, and in English common law practice as "a complaint or accusation *exhibited* against a person for some criminal offense." 4 Blackstone Comm. 308.

It would be difficult to conceive a prosecution instituted on oral complaint, and to hold that the duty of reducing it to writing is not *required* of the commissioner, but of the complainant or the District Attorney seems like a quibble; as well might it he said that the commissioner could not charge for the oath because not bound to administer it himself. Moreover in the present case the magistrate, under his state law, may, in felonies

himself institute the prosecution by sending out into the highways and hedges and compelling the witnesses to come in.

The actual rendition of these services is admitted and they are controverted on the ground that they were not necessary. I submit that this view is contrary to that taken by this court in U. S. *vs.* Jones, 35 L. Ed. 1007 where it was held that the circuit court's approval of a commissioner's account, under act of February 22, 1875, was conclusive in the absence of proof of mistake. This cannot reasonably be held to mean the actuality only and not the necessity of the service since the court is required to be satisfied of both before it approves.

3. For entering on his docket the returns on the warrants and subpœnas. The Court of Claims in the Stafford case *supra* held that no fee appears to have been prescribed for this brief notation. As the fee allowed a clerk for entering any return is 15 cents per folio, and commissioners are allowed the same fees as clerks for like services, this holding can only be accounted for upon the theory that the Court of Claims draws a distinction between a noting and an entering.

For, whatever may be the law as to docket fees, the commissioner is none the less required to keep a docket and if, as in this case is admitted, he enters returns of process thereon, and his docket would be incomplete without it. The law allows a fee for such entering.

4. For making dockets indexes and taxing costs. The government claims that these fees have been repealed by a clause in the deficiency appropriation act, for fiscal year 1886.

In a general appropriation bill each item is to be considered as an independent piece of legislation. The appropriation for fees of commissioner in the act making appropriations to supply deficiences in the appropriations for the fiscal year ending June 30, 1886, approved

August 4, 1886, Sec. 24 Stat. L. 274, is therefore to be read and construed as though it were a single act reading with the enacting clause as follows:

Be it enacted, etc., That the following sum be and the same is hereby appropriated out of any money in the treasury not otherwise appropriated, to supply a deficiency in the appropriation for the fiscal year 1886, for fees of commissioners and justices of the peace acting as commissioners, fifty thousand dollars.

Provided, That for issuing any warrant or writ or for any other necessary service commissioners may be paid the same compensation as is allowed to clerks for like services, but they shall not be entitled to any docket fees."

The last clause is an exception rather than a proviso, although it commences with the word "provided." An exception *exempts* absolutely from the operations of an engagement or an enactment, a proviso defeats their operation *conditionally*. See Bouviers Law Dictionary title "proviso;" and there is no state of case provided for under this act in which commissioners may be paid docket fees. Hence, if these fees are exempted absolutely from this enactment, the exemption only goes to the extent of the enactment itself, which is only for a deficiency appropriation for the then just past fiscal year.

The various district and circuit courts have so greatly divided in their opinions as to the construction of this act, however, that the question as it was the day after the act was passed. A number of other cases than those cited by Judge Jackson in his opinion herein have since been reported, but the irrepressible conflict is continued and no new light is given, or at least such as is given points out two diverging roads. I apprehend that the government will rely for authority mainly on the case of Faris *vs.* U. S., 23 Court of Claims 374, partly

because that body contains a multiplicity of judges and is presumed to represent the whole country.

It should be remembered, however, that that court, under the act of March 3, 1887, stands, as to these cases, on precisely the same footing as the various circuit and district courts. If each court is to count as a unit the commissioners have a decided majority in the count of reported opinions. The Court of Claims says (referring to this court's decision that commissioners were entitled to these fees under the Revised Statutes). "As the decision of the Supreme Court was rendered January 18, 1886, it cannot be doubted that the attention of Congress had been called to it, and that this proviso was enacted for the purpose of cutting off all such fees at least for the future. After reciting certain services for which compensation is to be allowed the act declares that 'they shall not be entitled to any docket fees.' The language is plain and positive." Although the case seems to have been argued and decided without any authorities submitted on either side the Court of Claims makes felicitous use of words in the expression "it cannot be doubted," since, as will be seen later on if it could be doubted or reasonably doubted that doubt must be resolved against the repealing effect. Its language, however is not so fitly chosen when it says that the "proviso" recites certain services for which compensation *is to be allowed*. The words used by Congress are that certain compensasion *may be paid* to commissioners, but they shall not be entitled to any docket fees. The distinction is obvious; when Congress in the Revised Statutes sec. 823 undertook to lay down a general rule for a schedule of fees for court officials it used the words "shall be taxed and allowed." When in the deficiency Act of August 4, 1886 it undertook to make an appropriation, the only constitutional means of payment, it used the words "may be paid." Is it unreasonable

therefore to conclude that the Congress on the face of the statute meant to limit the payment out of the appropriation and exclude from its operation a certain class of fees, rather than to conclude that Congress in a vague and indirect manner, meant to repeal parts of the sections of the Revised Statutes 823, 828 and 847? It is tacitly admitted by the Court of Claims that extraneous matter must be considered to enable it to reach its conclusions, and the fact that the Supreme Court had but a few months previously announced that commissioners were entitled to these fees, is cited. This is legitimate so far as it goes but there were circumstances and executive or departmental action in connection with the Supreme Court's decision that were equally well known and communicated to Congress. The First Comptroller had, for reasons satisfactory to himself, laid down the rule that he would not certify for payment, out of the appropriation for fees of commissioners any docket fees that accrued prior to the 18th of January 1886, a little more than half of the fiscal year 1886, but would remit claimants to the courts for relief, where, if their claims were allowed, they would be paid out of a separate appropriation to pay judgments against the U. S. In view of the notoriety given the Comptroller's conclusion it is not unreasonable to assume that Congress concluded that docket fees had not been estimated for and that it would be but right in making a deficiency appropriation to put the whole fiscal year on a uniform scale, and let docket fees begin with the new fiscal year. This assumption is strengthened by the fact that while the sundry civil act, approved same date, 24 Stat. L. 253, in which we would naturally look to see any limitations on future fees, makes restrictions for clerks and marshals for the following fiscal year, excluding certain fees, none whatever are placed upon the appropriation for commissioners.

The two acts considered together establish the fact that it is not unusual for Congress to place limitations on the use of an appropriation, while not absolutely depriving claimants of their right to their fees or claims through the courts, and therefore this contention cannot be made, that it is unreasonable or absurd to suppose that Congress would cut off fees already earned. The fact that the clause in contention recites certain fees similar to clerk, which may be paid, does not establish the fact that it intended to repeal and re-enact that clause of sec. 847, in different words inserting the word "necessary" before service and the words "may be paid," before compensation. However inartificially the clause may be drawn, it is not unreasonable to view its repetitions of existing law as mere recitals intended, in connection with the appropriating clause, to show what class of clerks fees to commissioners, may, and what may not, be paid out of the amount appropriated. This construction is strengthened by the use of the word "necessary" which is only used in previous enactments with reference to claims presented to accounting officers. Had the Congress intended this clause as a law for the future it is but reasonable to conclude that it would have inserted the word "hereafter" either at the commencement or some other appropriate part of the clause.

I have proceeded upon the theory that it is only necessary for the claimant to show that his view of the construction to be given this clause is not unreasonable. The court below very ably sets forth its reasoning why it cannot consider this a repeal by implication. The universal tendency of adjudication has been adverse to such construction and at present term of this court in Cope *vs.* Cope et al., opinion by Justice Brown this crystallization of authorities on this question is given.

"Nothing is better settled than that repeals, and the same may be said of annulments, by implication are not

favored by the courts, and that no statute will be construed as repealing a prior one unless so clearly repugnant thereto as to admit of no other reasonable construction.

McCool *vs.* Smith, 1 Black 439.
Bower *vs.* Lease, 5 Hill 221.
Ex. Parte *vs.* Yerger, 8 Wall 85, 105.
Furman *vs.* Nicholl, 8 Wall 44.
U. S. *vs.* 67 Packages, 17 How. 85.
Red Rock *vs.* Henry, 106 U. S. 596."

There seems to me no repugnancy whatever, certainly no clear repugnancy, between a general law, fixing the fees which may be allowed an officer, and a clause in an appropriation bill to pay such officer for past services rendered the U. S., which declares, without any words indicating that it is to apply to future services, for what services he may be paid and for what he shall not be entitled to pay.

Fees as Chief Supervisor.

First, I wish to call the court's attention to the fact that it appears from the allegations of the petition and the deposition of the appellee and Mr. Ford that the services charged for by the appellee were faithfully done; that they were necessary; that they were being performed during a period of eight or ten weeks; and that they were onerous, difficult and constant. Many services rendered have not been charged for, and are not included in the items on which suit has been brought; but I shall discuss only the fees claimed in the petition.

It has always been understood that Congress, in providing a system of fees, intended that the compensation, taking the fees altogether, should, on the whole, pay public officers reasonably well for their work, notwithstanding some particular fee might seem either too small or too large.

(2 Par.A). The first item discussed in sub-division A, of the 2d Par. of the opinion of the circuit court and set out in the 1st Par. of the petition is the charge for drafting "instructions" which the chief supervisor "prepared and furnished for the use and direction of the supervisors of election," according to the provisions of section 2026 Revised Statutes of the United States. Under said section it was the duty of chief supervisor to prepare and deliver these instructions. They were, in fact delivered both orally and in writing. The preparation of them required great investigation and the utmost care. Before writing them it was necessary for the chief supervisor to study and construe all the statutes of the United States and Kentucky, on the subject of elections and all the decisions of the courts thereon; many difficult legal questions had to be solved with an impartiality and fairness that could be appreciated by all parties. In section 2031, Revised Statutes of the U. S., we find these words: "There shall be allowed and paid to the chief supervisor for his services as such officer, the following compensation, apart from and in excess of all fees allowed by law for the performance of any duty as circuit court commissioner."

In the case of Gayer *vs.* the United States, 33 Federal Rep., page 627, the court said: "Having had imposed on him the commissioner, the performance of services connected with elections as chief supervisors he exercises the functions of this office in connecting with his function as commissioner. Under section 2021, for his extraordinary services as chief supervisor, he is allowed the compensation fixed by section 2031.

If in discharging these, he does his duties as commissioner, provision for which is not made in this section, he is entitled to the compensation of a commissioner as fixed by section 847. In re Conrad 15th Fed. Rep. 641.

Under section 847, R. S., U. S., it is provided that the commissioner shall be paid "for any other services (not specifically mentioned in that section) the same compensation as is allowed clerks for like services" and under section 828 it is provided that the commissioner shall be paid for drawing "any bond or making any record, certificate, return or report, for each folio 15 cents."

Under this section in Gayer *vs.* the United States, 33d Fed. Rep. 625, the court allowed the chief supervisor, as a commissioner, a compensation for preparing these instructions. In that case the court say (629): "preparing and forwarding instructions to 637 supervisors. Under section 2026 he must prepare them. As commissioner, for preparing papers, he is allowed 15 cents per folio. For each copy out of his office, under section 828, he is entitled, as commissioner, to 10 cents per folio. This much is allowed."

In re Conrad, 15th Fed. Rep. 641 the court said (p. 644): "By section 2026 R. S., it is the imperative requirement that the chief supervisor, "shall prepare and furnish all necessary instructions for the use and direction of the supervisors." Considering the fact that the supervisors of election are scattered over large and remote sections of the district, and that many of them are unfamiliar with the duties and responsibilities of their position, the wisdom of the requirement "that the chief supervisor shall furnish them instructions" is apparent. The claim is for 15 cents per folio for drafting such instructions to supervisors, and we think it clearly within the provisions of section 828 of the Revised Statutes. The charge is accordingly allowed." In Poinier *vs.* the United States, 40th Fed. Rep. 139, the court allowed 15 cents per folio for the instructions and 10 cents for each copy. In Walker *vs.* the United States, 41 Fed. Rep. 672, the court allowed the chief supervisor 15 cents per folio for all the instructions, and

20 cents for each seal attached to them by the chief supervisor. In the present case 15 cents has been allowed for instructions. The District Judge and the District Attorney approved the accounts sued on herein and the circuit court, considering the rulings in the Conrad case and in the Walker case, more reasonable than the ruling in the Gayer case, allowed McDermott 15 cents per folio for each of the instructions furnished by him to the supervisors. Each instruction is a separate instrument, and whether written or printed should be paid for as an original paper. A copy of his instructions to the supervisors in the city of Louisville prior to the registration of voters in October 1888, is filed herein; also a copy of his instructions to the supervisors in said city prior to the election November 5, 1888, and a copy of the instructions furnished by him to the supervisors in Jefferson county, Covington, Newport and Paducah.

The instructions relative to the registration of voters were necessarily different from the instructions issued for the guidance of the supervisors at the election in Louisville, and the instructions required for the election in Louisville were necessarily different, from the instructions necessary in Covington, Newport, Paducah and Jefferson county, where voters are not registered. The cases cited above seem to be conclusive upon the questions involved in this case. If the chief supervisor, as such or as commissioner, is entitled to a fee for drafting any paper he is entitled to the same fee for drafting instructions. Under the law he MUST draft the instructions, and under section 828 he is allowed for drawing any bond, or making any record, certificate, return or report, for each folio, 15 cents." Of course, this language is broad and should be liberally construed, else the purpose of the statute would be frustrated.

The instructions in this case were first carefully prepared in manuscript; then they were printed, then they

were carefully explained, orally, by the chief supervisor to his assistants. The slightest mistake in these instructions, or the failure to give almost any part of them might have caused great trouble, confusion or injustice. Most voters regard their right to vote as very important and are jealous of any interference by the supervisors. If the latter were not carefully instructed, or, if they had not their instructions always at hand to guide them, they might commit errors and cause hardships that would sometimes lead to the most disastrous consequences.

No part of the duty of the chief supervisor is so important and so delicate and so hard to do as the preparation and explanation of these instructions. They must be written plainly and be explained again and again. To pay nothing for such labor and skill would be unreasonable.

(2 Par. B). The special instructions, mentioned in "B" of the opinion of the circuit court (Page 4 of the Record) were indispensable. The supervisors were at the polls confronted with questions which they, with their limited knowledge of the subject, could not answer, and they properly applied to the chief supervisor for immediate instructions, as he could not talk to them, he was compelled to issue special instructions at once. The preparation of these papers was, of course, laborious and trying. They had to be issued under seal to prevent frauds. They were absolutely necessary to protect some innocent voters and to thwart some persons unjustly trying to vote. For drafting these papers the same fee of 15 cents per folio is charged.

At the registration of voters in Louisville many errors were made by the officers and some qualified voters were wronged. Afterwards the clerks who kept the registration books made errors which put in doubt the right of various other voters to vote. It is as much the duty of the chief supervisor to protect qualified voters as to detect

unqualified persons trying to vote. Without these special instructions the supervisors, acting under their general instructions, would have challenged these qualified voters who, without any fault upon their part, would have been deprived of their votes. According to section 2031 the chief supervisor is allowed "for affixing his seal to any paper, record, report or instrument, 20 cents."

(2 Par. C). In subdivision "C" in the 2d paragraph of the opinion of the circuit court, the court refused to allow the chief supervisor for drafting the notices sent to the supervisors to tell them when their attendance was required and when the oath of office was to be administered to them. Under section 2026 of the Revised Statutes it was the duty of the chief supervisor to furnish "all necessary forms and blanks for the use and direction of the supervisors" and it was his duty to instruct them. He could not call them together by a newspaper notice. He had to send them written notices through the mail requiring them to meet him at some particular time and place. These notices had to be prepared or written by the chief supervisor, and, according to the decisions frequently cited, he is entitled to 15 cents per folio for preparing or writing any paper, whether it is a notice, an affidavit, an instruction, or anything else.

These notices were sent in the discharge of his duty. He was bound to send them. They were sent through the post office and the chief supervisor actually had to pay the government the postage on them. He has been refused any compensation whatever on this account. This seems unjust.

(2 Par. D). In the subdivision "D" of the second paragraph of the opinion of the court, the chief supervisor is allowed 15 cents per folio for copies of the oaths of office filed in this office. It appears from the certified copies on file in this case that Mr. McDermott received several letters from the Department of Justice instructing him

to make, for the use of the Government, certified copies of the papers on file in his office. The Attorney General, as appears from his letter of Nov. 13th, 1881, informed the U. S. Marshal here, that he, the Attorney General, wanted copies of the oaths of office of the supervisors and the special deputy marshal. It appears also from letter of the U. S. Marshal of Kentucky that the Attorney General desired an affidavit from each supervisor and special deputy marshal showing the performance of such services as were charged for and the Attorney General also desired "that the same facts should also be known to him (the marshal) through other means." The marshal requested Mr. McDermott to attach to each affidavit of the supervisors and the special deputy marshals a statement or certificate showing that the respective claim for services were just. The chief supervisor wrote on Nov. 19th, 1888, to the Attorney General informing him of the request of the marshal and the instructions of the attorney in Louisville that he would make the copies, if desired, and would "charge the Government for the copy." The Attorney General replied, instructing him to give each supervisor a certified copy of his oath of office, etc. Afterwards he received instructions relative to other copies needed or required by the U. S. attorney for the district of Kentucky.

The chief supervisor, as appears from his proof, made copies of the oaths of office of the supervisors and 136 copies of the oaths of office of the special deputy marshals and each one of them contained one folio, and to each copy he added his certificate, showing that it was a true copy. Under § 2031 the Chief Supervisor is allowed 15¢ per folio for each

Under section 828 U. S. R. S. he is allowed "~~for a copy of any paper on file, for each folio, 10 cents~~; for making any certificate, for each folio, 15 cents." To these oaths of office and the certificates thereon was attached his seal of office, but no charge has been made for this ser-

vice, although in the case of Gayer *vs.* the U. S., 33d Fed. Rep. page 628, No. 8 and 9, the court allowed for "seals."

(2 Par. E). To the affidavit made by each supervisor and special deputy marshal to show how many days each had served the chief supervisor (according to the orders mentioned above) added his own statement to show whether that affidavit, according to his own records, was true or not. The chief supervisor alone knew how many days these men, in fact, served, and the Attorney General, for the protection of the government, desired, as he said, that the marshal should know these facts to be true "through other means than the mere affidavits of the supervisors and special deputy marshals." The proper charge for drafting these certificates, under section 828 is 15 cents per folio. He also attached his seal to these certificates but has made no charge therefor. All of these copies and certificates were made at the request of the Department of Justice and for the benefit of the government and to repudiate their payment now would certainly not be just.

The statements or certificates to which I have just referred above are mentioned in subdivision "E" of the second paragraph of the circuit court is opinion. For drawing these statements or certificates as to the justness of the claims of the supervisors, the chief supervisor should be allowed the same fee of 15 cents per folio allowed for drawing any other paper or writing of any kind. This statement of his was made under orders of the government.

(2 Par. F). Subdivision "F" of the second paragraph of the opinion of the circuit court refuses to allow the chief supervisor 10 cents a mile for his trip to Covington and Newport under the orders of the court. He was compelled, under sections 2012 and 2013 R. S. U. S. to attend court while the district judge was performing his

duties in connection with the election. The district judge went to Covington and Newport and appointed supervisors for these towns, and plaintiff was bound to accompany him and to recommend supervisors for appointment

Under the cases cited the chief supervisor as commissioner and chief supervisor, is entitled under section 847 to the "same compensation allowed to clerks for like services" and under section 828 the clerk is allowed "for travelling from the office of the clerk, where he is required to reside, to the place of holding any court required by law to be held, five cents a mile for going and five cents a mile for returning." It surely could not be intended by Congress that the chief supervisor who, when required by the court, must go to all parts of the state and appoint supervisors whenever they may be required, should pay his own travelling expenses. There are about one hundred and eighteen or twenty counties in Kentucky, and, if he could be compelled to go to all of these counties, and to pay his own travelling expense, without being reimbursed by the government, his office would, indeed, be a ruinous burden.

All the compensation received by him for other services might be spent by him in paying his own travelling expenses.

The circuit court, in its opinion, intimated that perhaps the chief supervisor might be entitled to his travelling expenses, but it would be better for the government to pay him simply mileage. The language of the statute seems to be in favor of allowing him mileage. In Poinier *vs.* the U. S., 40th Fed. Red. 129, the court allowed the chief supervisor mileage.

(2 Par. G). Subdivision "G" of the second paragraph of the circuit courts opinion treats of the fees charged by the chief supervisor for swearing witnesses and voters when the latter came to the chief supervisor and claimed

that they were being unjustly denied the right to vote.

In order to ascertain whether they were qualified voters or not and to protect the public against fraud, the chief supervisor was bound to administer an oath to these voters and this witness.

Whenever the chief supervisor administers an oath, he is, under section 828, allowed for administering the oath 15 cents.

In Gayer *vs.* the U. S. *supra*, he is allowed fees for administering oaths and attaching his certificate to the same.

If the chief supervisor could not protect himself by requiring oaths from voters and witnesses under such circumstances, great frauds would be perpetrated. It is right to pay for such precautionary measures. The fee allowed for these oaths is small enough. Under section 2026 R. S. the chief supervisor is bound to cause the right of voters "whose right to register is honestly doubted to be verified by proper inquiry and examination."

(2 Par. H). Subdivision H of the second paragraph of the circuit court's opinion. Under sections 2012, 2013 and 2026 R. S. of U. S., as cited above, Mr. McDermott was compelled to attend court when opened by the judge, and was compelled to be there "from day to day and from time to time" while the judge was appointing supervisors; and the circuit court, when opened by the judge, "therefrom and thereafter and up to and including the day following the day of election" had to be always open for the transaction of business under this title and the powers and jurisdiction of the court had to be exercised "as well in vacation as in term time."

The proof is that the court was actually open 25 days from the time the chief supervisor was appointed until the day of the election. In fact he was nominating supervisors and performing all his duties on all the days,

except Sundays, but it appears the court was actually open 25 days.

In section 828, it is said that a clerk is entitled to "five dollars a day for his attendance on court while actually in session." The clerk is allowed this money at all times and his services are of the same sort as the chief supervisor's. The latter is not allowed this money as a commissioner for trying criminal cases. He is allowed this *per diem*, like the clerk, for being in attendance on the court, and for making records of the orders issued to him as chief supervisor by the court. There is no analogy between the duties performed by the clerk and by the commissioner hearing criminal cases. It is true, the chief supervisor does sometimes hear criminal cases as a commissioner and then he is allowed the five dollars per day for these services, but the claim in this case is for services of a different sort—for services exactly like those rendered by the clerk while receiving from the court its orders..

In the case of Gayer *vs.* the United States 33d Fed. Rep., page 628 the court allowed the chief supervisor five dollars per day for 26 days, thereby overruling the Conrad case, which limited the *per diem* to 10 days. The judge of the district court of Kentucky, and the District Attorney, approved the Gayer case and allowed chief supervisor, McDermott his *per diem* for 25 days. The circuit court has refused to follow that case. In Poinier *vs.* the United States, 40 Fed. Rep. 139 the court followed the Gayer case and allowed the chief supervisor his *per diem* of five dollars.

It would be strange if the chief supervisor could be kept for days and weeks, and it might be for months, in daily attendance on the court and be allowed nothing for his attendance. His being in the court might make it impossible for him to earn the fees otherwise provided for.

He must be present in order to give the court constant information of the persons recommended for supervisor and to give information on any other matter pertaining to the conduct of the election. The judgment of the circuit court as to this item, therefore, seems to be incorrect.

It has been seen that the judgment of the circuit court in this case is sustained by a number of authorities wherever it was decided in favor of Mr. McDermott; but not in those rulings which are adverse to him. It is clear that for drawing any necessary paper he is entitled to 15 cents per folio. The copies and certificates made on the orders of the Department of Justice are specially just. To say that the Attorney General and District Attorney cannot order copies for the protection of their client, the government, would be astonishing. These charges for the copies are plainly fixed by the statutes and cannot be disputed. The First Comptroller simply denied that the Attorney General and District Attorney had authority to order copies of the papers that they considered necessary for the government.

Though to some persons it might seem that the fees allowed to the chief supervisor amount to a great deal, yet in truth, the aggregate amount is small for the work and responsibility which he undertook. This office is indeed, a most trying and important one. Only a lawyer familiar with election laws can possibly discharge these duties, and, unless a man of high-standing in the community, he cannot have the confidence of the people. He stands as an arbitor between political parties at a time of great public excitement.

No man worthy of filling this important place can be induced to discharge its duties unless he is liberally paid.

If the rulings in the office of the First Comptroller of the Treasury in Mr. McDermott's case are sustained then

he will actually lose money and will get no profit whatever for his onerous task. Other chief supervisors have already been paid the fees denied him. This case will settle the law for all, and will determine whether the office is an ~~uninvestigated~~ burden. As Edmund Burke well said, "No government can ever expect good services from its officers unless they are adequately paid." No officer can be more important than one whose duty it is to preserve the purity and the fairness of the elections of the people in a great republic.

An affirmance on the original and a reversal on the cross appeal is respectfully asked.

ORRIN B. HALLAM,
Attorney for E. J. McDermott.